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No. 80-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

COMMUNITY COMMUNICATIONS COMPANY, INC.
Petitioner,

v.

CITY OF BOULDER, COLORADO, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. Are home rule municipalities automatically immune from liability under the federal antitrust laws by operation of the state action doctrine?

2. Assuming *arguendo* that the acts here complained of can be properly classified as "non-proprietary" or "governmental," is Respondent City of Boulder immune from liability under the federal antitrust laws, because *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978), is limited to "proprietary" conduct?

PARTIES TO THE PROCEEDING

Petitioner: Community Communications Company, Inc., a Colorado corporation and a wholly owned subsidiary of Tele-communications, Inc., a Delaware corporation (see Appendix for List of Petitioner's Affiliated Companies).

Respondents: City of Boulder, Colorado; Boulder Communications Co., a Colorado corporation; Thomas Cross; I. Jack Kerner; Michael Thompson; Donald Passalaqua; Barry Telleen; and Dennis DuBe.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 630 F.2d 704 and appears in the Appendix herein. The opinion of the United States District Court for the District of Colorado is reported at 485 F. Supp. 1035 and also appears in the Appendix.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on May 28, 1980. A timely petition for rehearing en banc was denied by order entered October 1, 1980. This petition is filed within the period of time established by order of Justice White dated December 9, 1980. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) (1966).

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

The following constitutional provisions, statutes, and ordinances are quoted in the Appendix:

Home Rule Amendment, Colo. Const. art. XX, § 6

Boulder, Colo., Ordinance No. 2846 (Oct. 6, 1964)

Boulder, Colo., Ordinance No. 4472 (Dec. 18, 1979)

Boulder, Colo., Ordinance No. 4473 (Dec. 18, 1979)

Colorado Antitrust Statute, Colo. Rev. Stat. §§ 6-4-101, 6-4-102 (1974 & Supp. 1979)

Municipal Powers Statute, Colo. Rev. Stat. § 31-15-702(1) (1974)

Sherman Antitrust Act §§ 1, 2, 26 Stat. 209, as amended, 15 U.S.C. § 1, 2 (1976)

Supremacy Clause, U.S. Const. art. VI, cl.2

STATEMENT OF THE CASE

This antitrust case arises from the Boulder City Council's rescission of a permit granted Petitioner, Community Communications Company, Inc., to operate a cable television system throughout the City of Boulder, Colorado. The City Council granted the permit to Petitioner's pre-

decessor by Ordinance No. 2846, enacted October 6, 1964. The permit was revocable, nonexclusive, and for a twenty-year term. In consideration for the permit, the grantee agreed to pay the City of Boulder 2% of annual gross revenues. The City Council consented to the assignment of the permit to Petitioner by resolution adopted July 5, 1966.

The original purpose of the permit was to enable Boulder residents with poor off-air antenna reception of Denver television stations to receive the Denver signals by cable television. Conventional television transmission is poor in part of the city due to Boulder's location at the foothills of the Rocky Mountains. Petitioner restricted cable television service to the area of poor antenna reception, a neighborhood comprising about 20% of Boulder's residential units, since the remainder of Boulder's residents had no demand for Petitioner's service.

Cable television technology improved dramatically in 1978 and 1979. In addition to the retransmission of television signals, reception of a variety of non-broadcast programming material became practical via satellite technology. Because of the availability of this new programming, Petitioner believed that there would be a demand for cable television service city-wide. On May 9, 1979, Petitioner notified the City Council of its intent to expand both programming and the physical area served. In reliance upon the City Council's favorable response,[1] Petitioner spent approximately $900,000 on facilities, supplies, and labor.

On July 1, 1979, Boulder Communications Company [hereinafter BCC], a newly formed business organized by six Boulder citizens, requested a permit from the City

[1] In a letter to Petitioner dated May 25, 1979, the City Council's designated cable coordinator and Director of Media and Programming of the Boulder Public Library, Mr. Richard Varnes, expressed great pleasure with Petitioner's decision to expand service.

Council to compete with Petitioner for cable television customers city-wide. Since Petitioner's permit was nonexclusive, the City Council was legally able to grant another permit. Moreover, Mountain States Telephone & Telegraph Company and the Public Service Company of Colorado, joint owners of the utility poles upon which Petitioner's cable was strung, informed City Council that the utility poles could accommodate additional cables. The cable television consultant to the City Council advised that cable television service was not a natural monopoly and that competitive service was feasible.[2] Furthermore, Petitioner expressly declared its willingness to compete with BCC. Despite the absence of legal, physical, and economic constraints, the City Council declined to issue BCC a permit.

Between July 1979 and December 1979, representatives of BCC and the City of Boulder held a number of meetings. Initially, BCC asked the city to issue a second nonexclusive permit to provide cable television service. Later, however, BCC urged the city to revoke Petitioner's permit and award BCC the sole permit.

By memorandum dated December 8, 1979, the City Attorney advised the City Council that Petitioner was complying with the license contract and that unilateral revocation of Petitioner's license would be illegal. The City Attorney urged a contractual method to rescind Petitioner's permit: the adoption of ordinances imposing a moratorium on Petitioner's expansion and providing that continued service by Petitioner in the area then served would signify Petitioner's acceptance. 630 F.2d 704, 715 (Markey, C. J., dissenting.)

The City Council enacted two ordinances on December 18, 1979. Ordinance No. 4472 repealed Ordinance No.

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[2]The city's cable television consultant, Mr. Robert Sample, former Director of Media and Programming of the Boulder Public Library, advised the City Council on July 31, 1979: "[I]f there are a couple of franchise holders, they may overbuild the other and compete for service."

2846, which had granted Petitioner the permit to provide city-wide cable television service, and reenacted Ordinance No. 2846 subject to a 90-day moratorium on construction. Ordinance No. 4473 declared the situation an emergency, *i.e.*, threatening the public health and safety of the community, so that Ordinance No. 4472 could be implemented immediately. The putative purpose of the moratorium was to freeze the status quo so that potential competitors might "catch up" with Petitioner.[3]

On January 15, 1980, Petitioner filed a complaint in the United States District Court for the District of Colorado seeking an injunction against the enforcement of Ordinance Nos. 4472 and 4473, on grounds that they violated Section 1 of the Sherman Act, 15 U.S.C. § 1 (1976), as well as other state and federal laws. During the pendency of the federal action, Petitioner continued its construction program and on February 4, 1980, the city filed a state court action in the Boulder District Court seeking to enjoin Petitioner from stringing new cable. The state court denied the city's requested injunction on February 6, 1980. *City of Boulder v. Community Communications Co.*, No. 80 CV 0198-1 (Boulder Dist. Ct. Feb. 6, 1980).

The city then resorted to self-help: civil and criminal citations were issued to Petitioner's cable-stringers, and on February 11, 1980, the City Manager ordered city employees to dismantle Petitioner's newly strung cable. By February 14, 1980, 6,350 feet of Petitioner's cable had been

[3] Shortly after enactment of the ordinances, the City Council issued a request for bids from other cable companies. The City Council also promulgated a model cable television ordinance, the terms of which reflected an increasingly proprietary interest in cable television: the city would have the unconditional right to purchase the cable television system at a price excluding goodwill and limited to depreciated capital investment; the city would retain the right of prior approval of every contract negotiated by the cable television company, including contracts on program content; and, in consideration for the permit, the cable television company would pay the city 5% of its annual gross revenues.

destroyed. Thereafter, Petitioner ceased cable construction and, on February 22, 1980, filed a motion for preliminary injunctive relief.

In considering the antitrust claim, the trial court focused on the immunity question. The court believed that antitrust liability would not apply to a home rule city's actions which were local, governmental (as opposed to proprietary), and properly within the authority granted it by Article XX (the home rule provision) of the Colorado Constitution. After expressing some doubt that the City of Boulder had the authority claimed over cable television, the court held that even if such authority existed, the use of that authority to impose the terms and conditions of a model ordinance requiring prescribed forms of media service is not a typically governmental type of action which would entitle it to immunity. 485 F. Supp. at 1039.

On March 17, 1980, the United States District Court, granted Petitioner a preliminary injunction and entered the following order:

> [T]hat so long as the plaintiff, Community Communications Company, Inc., operates within the terms and conditions of Ordinance No. 2846, enacted October 6, 1964, the City of Boulder and all of its officers agents, servants, employees, and attorneys are enjoined from taking any unilateral action to restrict, limit, or revoke the authority of the plaintiff to conduct its cable television business in the City of Boulder.

485 F. Supp. 1035, 1041.

The United States Court of Appeals for the Tenth Circuit in a split decision entered May 28, 1980, reversed the District Court, holding that the City of Boulder was immune from Petitioner's antitrust claim. The Court of Appeals first distinguished *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978), the landmark case addressing the application of *Parker* state action immunity

to municipalities, as a case applicable only to the proprietary conduct of municipalities. The conduct of the City of Boulder was classified as non-proprietary. The Court then concluded that since Colorado home rule cities were sovereign in matters of local concern, they should be accorded deference as states in applying the antitrust laws to their conduct. Finding that cable television was a matter of purely local concern, the Court held that the Boulder ordinances contained the requisite expression of state policy to displace competition and, in enforcing the ordinances, the City had met the requirement of active supervision set forth in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980).

"[C]ompelled by a conviction that the judgment below was eminently sound and unequivocally correct," 630 F.2d at 709, Judge Markey, Chief Judge of the United States Court of Customs and Patent Appeals, sitting by designation, filed a vigorous dissenting opinion on July 1, 1980. In his view:

> Colorado home rule cities do not have antitrust immunity under *City of Lafayette* standards. No state policy whatsoever exists in relation to cable TV . . . . With no policy whatever on regulation of cable TV, by cities or otherwise, it can hardly be said that Colorado has a state policy "to displace competition" in cable TV with regulation or monopoly public service. Much less can it be said that Colorado has a comprehensive, clearly articulated, affirmatively expressed, and actively state supervised anticompetitive policy for cable TV.

630 F.2d at 717.

Pursuant to Rule 35, F.R.A.P., Petitioner submitted a petition for rehearing en banc on June 25, 1980. By order October 1, 1980, the petition was denied.

REASONS FOR ALLOWANCE OF THE WRIT

I. Introduction: The Tenth Circuit's Decision To Confer Broad Antitrust Immunity On Local Governments Conflicts Directly With The Decisions Of This Court.

In *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978), this Court held that the immunity conferred by *Parker v. Brown*, 317 U.S. 341 (1943), was not automatically applicable to local governmental units:

> [T]he Parker doctrine exempts only anticompetitive conduct engaged in as an act of government by the State as sovereign or by its subdivisions, pursuant to state policy to displace competition with regulation or monopoly public service . . .

435 U.S. at 413.

> [A]n adequate state mandate for anticompetitive activities of cities and other subordinate governmental units exists when it is found "from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of."

Id. at 415 (citation omitted).

In the language preceding this holding, the majority noted the presumption against repeal by implication of the antitrust laws, *Id.* at 399, and explained why that presumption should apply to local government:

> If municipalities were free to make economic choices counseled solely by their own parochial interests and without regard to their anticompetitive effects, a serious chink in the armor of antitrust protection would be introduced at odds with the comprehensive policy [of competition] Congress established.

Id. at 408.

> Cities are not themselves sovereign; they do not receive all the federal deference of the States that create them.

Id. at 412.

> In light of the serious economic dislocation which could result if cities were free to place their own parochial interests above the Nation's goals reflected in the antitrust laws, [citation] we are especially unwilling to presume that Congress intended to exclude anticompetitive municipal action from their reach.

Id. at 413.

> When cities, each of the same status under state law, are equally free to approach a policy decision in their own way, the anticompetitive restraints adopted as policy by any one of them, may express its own preference, rather than that of the State.

Id. at 414.

In four and one-half pages a Tenth Circuit panel has all but obliterated the plurality's holding, permitting the triumph of the parochial economic interests which *City of Lafayette* sought to restrain. After narrowly reading *City of Lafayette* as only including proprietary conduct within its compass, the Tenth Circuit found that the broad mandate over matters of local concern given Colorado home rule cities by the Colorado Constitution transformed such cities into the State when acting on local matters. Therefore, reasoned the majority, whenever a home rule city's conduct reflects *its own municipal* policy to displace competition, and is coupled with *city* supervision of the challenged conduct, the home rule municipality escapes liability under the test set forth in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980):

> We conclude that *City of Lafayette* is not applicable to a situation wherein the governmental entity is asserting a governmental rather than a proprietary interest, and that instead the *Parker-Midcal* doctrine is applicable to exempt the City from antitrust liability.

630 F.2d at 708.

By limiting *City of Lafayette* to proprietary conduct, the Tenth Circuit's opinion ignores Justice Brennan's plurality opinion which made no such distinction between governmental and proprietary conduct, and reads too much into the concurrence of the Chief Justice whose record opposing blanket antitrust immunity is well known. *See, e.g., Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975). It compounds this error by limiting the term proprietary to governmental operation or ownership of a business, a definition at odds with settled precepts of municipal law, Colorado state law and federal court decisions defining proprietary in the related *Noerr-Pennington*[4] context.

By totally immunizing Colorado home rule cities from the reach of the Sherman Act, the Tenth Circuit has effectively overruled *City of Lafayette*. Under the Tenth Circuit's test, the judicial inquiry will focus on whether a *municipal* policy, actively supervised by the *home rule city* itself, exists to displace competition. In fact, under the Tenth Circuit's holding, home rule cities will henceforth be treated as sovereigns, directly counter to *City of Lafayette's* mandate; every Colorado home rule city, each possessing the same status under state law, will be free to announce its own policy to govern competition, the very result which *City of Lafayette* sought to avoid. Thus, the concept of dual sovereignty underlying *Parker* is undermined as a new category of entities enjoying blanket immunity is created.

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[4]*Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.* 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

II. The Tenth Circuit's Decision Erroneously Elevates Colorado Home Rule Cities To The Status Of States – Precisely What City Of Lafayette Sought To Prevent.

A. THE OPINION EQUATES HOME RULE CITIES WITH THE STATE.

The Tenth Circuit's treatment of Boulder as a state is evidenced by its application of the test from *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, a case involving not a muncipality but a state agency. The court reasoned that Boulder's home rule status converted municipal action into state action:

> The [state] policy was affirmatively expressed through the language of the [municipal] ordinances. The second part of the *California Retail* test was met by the active supervision and enforcement of the policy by [the City of Boulder's] imposition of the 90-day moratorium on construction and by issuance of civil and then criminal citations to cable workers when the moratorium was ignored.

630 F.2d at 708.

Of course, given this test, all home rule cities, not just Colorado home rule cities, will usually find themselves immune. The structure of cities is such that their anticompetitive conduct will usually be a reflection of municipal policy and will be actively supervised by the City.

Let there be no doubt: the decision of the Tenth Circuit elevates home rule cities acting in local matters to the status of states. Lest petitioner's characterization of the decision be considered hyperbolic, the following language from a decision of the United States District Court for the District of Colorado following The Tenth Circuit's opinion is cited to the Court:

> [M]unicipal policy exercised by a Home Rule

> City in Colorado is the equivalent of "state action" when exercised in connection with local affairs.

Pueblo Aircraft Service, Inc. v. City of Pueblo, Colorado, 498 F. Supp. 1205, 1210 (D. Colo. 1980).

B. ATTRIBUTION OF STATE ACTION IMMUNITY TO HOME RULE MUNICIPALITIES SHATTERS THE DUAL SOVEREIGNTY OF OUR FEDERAL SYSTEM.

The quintessence of federalism is dual sovereignty of the state and national governments. The purpose of the *Parker* state action exemption is to prevent the federal government from undue encroachment upon *state* sovereignty. 317 U.S. at 350-51; *see Olsen v. Smith*, 195 U.S. 332, 344 (1904). "Government activity should be exempt from the antitrust laws, then, only if their application would 'severely impinge' upon the system of federalism." *Woolen v. Surtran Taxicabs, Inc.*, 461 F. Supp. 1025, 1028 (N.D. Tex. 1978).

As this Court has recognized, however: "[C]ities are not themselves sovereign; they do not receive all the federal deference of the States that create them." *City of Lafayette*, 435 U.S. at 412 (plurality opinion). It matters not that cities have home rule status. "However 'sovereign' home rule cities . . . may be [under state law], they nonetheless carry the status of municipalities so far as federalism is concerned." *Woolen v. Surtram Taxicabs, Inc.*, 461 F. Supp. 1025, 1032 (N.D. Tex. 1978). The Tenth Circuit's exaltation of home rule cities to sovereignty is, moreover, particularly anomalous, given the following declaration by the Supreme Court of Colorado:

> The United States Constitution provides for a national government with a federal system of *States*. All powers not expressly granted the fed-

> eral government are reserved to the *states or to the people*. United States Constitution, Tenth Amendment. Colorado's Enabling Act, approved by the federal government when we acquired statehood, insured that our state will have a republican form of government. Enabling Act, S 4. Clearly our federal system does not envisage as a part thereof city-states.

City & County of Denver v. Sweet, 138 Colo. 41, 48, 329 P.2d 441, 444-45 (1958) (emphasis in original).

The leading treatise on municipal law supports this statement of Colorado law: "[A] municipality adopting a home rule charter does not become an independent sovereignty." 2 E. McQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS, § 9.08a, at 638. (3d ed. 1979) (citations omitted).

C. ATTRIBUTION OF STATE ACTION IMMUNITY TO HOME RULE MUNICIPALITIES UNDERMINES THE ANTITRUST LAWS.

The attribution of state action immunity to home rule municipalities would effectively clothe hundreds of municipalities across the county with immunity from the antitrust laws. There are 55 home rule cities in Colorado alone. *See* Colorado Municipal League, MUNICIPAL AND COUNTY OFFICIALS IN COLORADO (1979). The Colorado Home Rule Amendment is not unique. At least forty state constitutions include home rule provisions. Levi, *Application of Municipal Ordinances to Special Purpose Districts and Regulated Industries: A Home Rule Approach*, 12 URB.L. ANN. 77, 78 n.4 (1976). Although differences exist

among the home rule provisions of state constitutions,[5] each grants municipalities autonomy over local affairs. Such local autonomy was the basis for the Tenth Circuit's decision. 630 F.2d at 708.

The impact of blanket antitrust immunity for home rule municipalities would be profound. As this Court has warned:

> If municipalities were free to make economic choices counseled solely by their own parochial interests and without regard to their anticompetitive effects, a serious chink in the armor of antitrust protection would be introduced at odds with the comprehensive national policy Congress established.

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[5] Constitutional home rule provisions are either self-executing, mandatory, or permissive. A self-executing provision authorizes a municipality to enact a home rule charter and exercise home rule powers, without state enabling legislation. A mandatory provision differs from a self-executing provision only in that state legislatures are directed to adopt enabling legislation prior to municipal home rule action. A permissive provision authorizes home rule, if the state legislature, in its discretion, delegates home rule powers to municipalities. *See generally* Vanlandingham, *Municipal Home Rule in the United States*, 10 WM. & MARY L. REV. 169, 178 (1968). Regardless of the nature of the constitutional provision, home rule municipalities have substantial authority to enact legislation on matters of local concern.

Six states with no constitutional home rule provisions have home rule statutes which also authorize municipal control over matters of local concern. *See* KAN. STAT. 15-124 19-101, (1975 & Supp. 1979); N.H. REV. STAT. ANN. 49:B:1, 3, 11 (Supp. 1979); N. Y. MUN. HOME RULE LAW (Consol. Supp. 1979); W. VA. CODE 8-12-2 (1976); N. J. STAT. ANN. 40:42:1 (Supp. 1979); TEX. CIV. STAT. ANN. ART. 46D (Vernon 1969). Respondent may argue that statutory home rule cities do not possess as much power as constitutional home rule cities, because the state legislature may modify the home rule grant by subsequent legislation. However, the powers of constitutional home rule cities may also be withdrawn or modified, albeit by constitutional amendment rather than legislative fiat. *City & County of Denver v. Sweet*, 138 Colo. at 49, 329 P.2d at 445.

City of Lafayette, 435 U.S. at 408 (footnote omitted). As Jude Markey noted in dissent, the Tenth Circuit panel opinion permits "a city ordinance [to] do what 'the Constitution or laws of any State' cannot do namely [create] new immunities from the 'Supreme Law of the Land.'" 630 F.2d at 715. For example, home rule municipalities would be free to award monopolies to favored companies, by enacting an ordinance. Furthermore, recognition of state action immunity for home rule cities opens the door to immunity for subordinate divisions of the municipal government as well as other political subdivisions, such as counties and school districts.

III. City Of Lafayette Is Not Limited To Proprietary Conduct.

This Court has never declared or applied different criteria to proprietary and governmental conduct of state government entities seeking state action antitrust immunity. *City of Lafayette* established no such proprietary - governmental distinction. 630 F.2d at 718 (Markey, C.J., dissenting). Indeed, the plurality opinion in *City of Lafayette* did not even characterize the conduct of the petitioning cities as proprietary or governmental. Only the concurring opinion of the Chief Justice drew such a distinction. 435 U.S. at 422. The *City of Lafayette* dissenters expressly rejected recognition of a proprietary-governmental distinction. *Id.* at 433-34.

If there were a proprietary - governmental distinction relevant to state action immunity, the distinction would logically apply to state agencies as well as political subdivisions. However, the post-*City of Lafayette* opinions of this Court involving state agencies are silent with respect to any such distinction. *See New Motor Vehicle Board of California v. Orrin W. Fox Co.*, 439 U.S. 96 (1978); *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.* 445 U.S. 97 (1980).

The Tenth Circuit majority herein apparently believed that the consideration of the proprietary-governmental distinction by the Chief Justice demonstrated his unwillingness to *ever* impose antitrust liability on cities acting in their governmental capacity. In the Tenth Circuit's view, the dissenters and the Chief Justice, comprising a majority of the *City of Lafayette* Court, would foreclose any extension of *City of Lafayette* beyond the proprietary conduct there held subject to liability. The *City of Lafayette* dissent cannot be read as endorsing a distinction between proprietary and governmental conduct. Moreover, the Chief Justice has long been absolutely opposed to blanket antitrust immunity.

A. THE CHIEF JUSTICE DOES NOT FAVOR BLANKET ANTITRUST IMMUNITY.

Petitioner submits that the Tenth Circuit majority has read too much into the *City of Lafayette* concurrence. The Chief Justice only sought to limit the Court's consideration to the issue of "whether the Sherman Act reaches the proprietary enterprises of municipalities" 435 U.S. at 422. A brief review of recent state-action immunity opinions authored by the Chief Justice belies any intention on his part to vest municipalities with blanket immunity when acting in their non-proprietary capacity.

The first major state-action opinion following *Parker v. Brown*, 317 U.S. 341 (1943), was *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), an opinion authored by Chief Justice Burger:

> The threshold inquiry . . . is whether the activity is required by the State acting as sovereign. [citations] . . . . It is not enough that . . . . anticompetitive conduct is prompted by state action; rather anticompetitive activities must be compelled by direction of the State acting as a sovereign.

Id. at 790-91.

Thereafter, in *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976), the Chief Justice authored a concurring opinion reiterating his view that "the threshold inquiry in determining if an anticompetitive activity is state action . . . is whether the activity is required by the State acting as sovereign." *Id.* at 604. He concurred with the majority's finding of liability predicated on the absence of a statewide policy in the field. *Id.* at 604-05.

In fact, the *City of Lafayette* concurrence in no way signals a retreat from Chief Justice Burger's *Goldfarb* and *Cantor* opinions. Discussing exemptions from the Sherman Act, the Chief Justice said:

> To allow the defenses asserted by the petitioners in this case would inject a wholly arbitrary variable into a "fundamental national economic policy," [citations omitted] which strongly disfavors immunity from its scope.

435 U.S. at 419-20.

This view is reflected in his criticism of the inquiry which the *City of Lafayette* plurality directed the District Court to make upon remand. After repeating his *Goldfarb* test, the Chief Justice stated:

> I would therefore remand directing the District Court to take an additional step beyond merely determining — as the plurality would — that any area of conflict between the State's regulatory policies and the federal antitrust laws was the result of a "state policy to displace competition with regulation or monopoly public service." This supplemental inquiry would consist of determining whether the implied exemption from federal law "was necessary in order to make the regulatory Act work, and even then only to the minimum extent necessary."

435 U.S. at 425-26 (citations omitted).

In a footnote to the *City of Lafayette* concurrence, the Chief Justice expressed further dissatisfaction with the plurality's test, arguing that it does not go sufficiently far to ensure that an exemption is not improperly granted. In fact, he expressed his reservations as to the sufficiency of the "contemplation" language used by the plurality. 435 U.S. at 426 n.6. Nothing in the passage suggests a *per se* immunity for governmental activity:

> While I agree with the plurality that a State may cause certain activities to be exempt from the federal antitrust laws by virtue of an articulated policy to displace competition with regulation, I would require a strong showing on the part of the defendant that the State so intended. Thus, I would not be satisfied, as the plurality and Court of Appeals apparently are, that the highest policymaking body in the State of Louisiana merely "contemplated" the activities being undertaken by the cities. See ante, at 415. I would insist, as the Court did in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), that the State *compel* the anticompetitive activity. Moreover, I would have the Cities demonstrate that the exemption was not only part of a regulatory scheme to supersede competition, but that it was essential to the State's plan. Consequently, I do not disagree with the terms of the plurality's remand as such. I would simply ask for a stronger showing on the part of the Cities. I join the judgment, however, and the directions of the remand, because they represent at minimum what I believe we should demand of petitioners.

Id.

To say that the Chief Justice favors *per se* immunity for non-proprietary conduct thus does not square with his

opinions in state action cases, *City of Lafayette* in particular. In fact, his opinion demonstrates the greatest reluctance to grant any blanket immunities.

Assuming *arguendo* that the state action immunity test for municipalities does require proprietary conduct, the Tenth Circuit erred in classifying Boulder's moratorium on Petitioner's cable construction as non-proprietary. The Tenth Circuit offered no explanation for summarily classifying the conduct of the City of Boulder as governmental, rather than proprietary.

B. BOULDER'S CONDUCT WAS PROPRIETARY AS THAT TERM HAS BEEN GENERALLY DEFINED.

Under Colorado law, it is well-settled that the enactment and enforcement of municipal ordinances like those at issue here are exercises of proprietary conduct, for two reasons: (1) the ordinances involve access to the city's rights of way; and (2) the ordinances involve the procurement of a service for the citizenry. The Boulder ordinances, by their terms, revoked a prior ordinance granting Petitioner the right to use city streets and rights-of-way for stringing cable, and then granted Petitioner the same rights subject to geographical restriction.

> The granting of the right by the city to a public service corporation to use the streets of the municipality, or the granting by the General Assembly to such a corporation of the right to use the highways of the state, is the exertion of the proprietary power of the sovereign.

City & County of Denver v. Mountain States Telephone & Telegraph Co., 67 Colo. 225, 230, 184 P. 604, 607 (1919), *overruled on other grounds, People v. Mountain States Telephone & Telegraph Co.*, 125 Colo. 167, 243 P.2d 397 (1952); *see* J. BANKS, COLORADO LAW OF CITIES & COUNTIES § 2.8, at 35 (3d ed. 1979).

Moreover, a line of cases applying the *Noerr-Pennington* doctrine in the First Amendment context have held that action like Boulder's herein is proprietary.[6]

The Boulder ordinances did involve the procurement of cable television service for the local citizenry.[7] "Obtaining for a municipality and its inhabitants of water, light, or similar service involves the exercise of proprietary or business powers of the municipality and not its governmental functions . . . ." 2 E. McQuillin, The Law of

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[6] *See, e.g., General Aircraft Corp. v. Air America, Inc.* 482 F. Supp. 3 (D.D.C. 1979) (purchase of aircraft by CIA held proprietary); *In Re Airport Car Rental Antitrust Litigation*, 474 F. Supp. 1072 (N.D. Cal. 1979) (leasing by airports of space to rental car companies held proprietary); *Kurek v. Pleasure Driveway and Park District*, 557 F.2d 580 (7th Cir. 1977), *vacated & remanded*, 435 U.S. 992, *aff'd per curiam on remand*, 583 F.2d 378 (7th Cir.), *cert. denied*, 439 U.S. 1990 (1978) (leasing of space in City golf courses to concessionaires held proprietary); *Hecht v. Pro-Football, Inc.*, 444 F.2d 931, 940-41 (D.C. Cir.), *cert. denied*, 404 U.S. 1047 (1971) (leasing football stadium by Armory Board held proprietary); *Sacramento Coca-Cola Bottling Co. v. Chauffeurs, Teamsters & Helpers, Local No. 150*, 440 F.2d 1096 (9th Cir.),*cert. denied*, 404 U.S. 826 (1971) (awarding of soft-drink concession held proprietary); *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 424 F.2d 24, 31-34 (1st Cir.), *cert denied*, 400 U.S. 850 (1970) (requesting bids, soliciting specifications for public swimming pool held proprietary).

[7] The procedure followed by Boulder, as well as the substance of the conduct, evidenced proprietary character. The City Attorney advised the City Council, by memorandum dated December 8, 1979, that the city could not unilaterally revoke petitioner's license and should, therefore, enter into a new contract with petitioner. In accordance with such advice, section 12 of Ordinance No. 4472, the moratorium ordinance, provides in part: "'The grantee shall signify its acceptance of the terms hereof by continuing to provide service to any customers presently served by the grantee." As Judge Markey noted in his dissent: "'The city's 'ordinances' are, in fact and intent, *contracts*, reflecting a *proprietary* interest." 630 F.2d at 719.

By the request for bid process, the City Council intended to select the "best" monopolist for the city. *Id.* at 709, 710 n.1 (Markey, C.J., dissenting).

MUNICIPAL CORPORATIONS, § 4.154, at 231 (3d ed. 1979); *accord, Perl-Mack Enterprises Co. v. City & County of Denver*, 194 Colo. 4, 9, 568 P.2d 468, 472 (1977) (city's contract with developer for sewage treatment service was proprietary); *National Food Stores, Inc. v. North Washington Street Water & Sanitation District*, 163 Colo. 192, 429 P.2d 285 (1967) (agreement by water district re provision of sewage treatment was "within the proper exercise of proprietary and business powers of a municipal corporation").

Furthermore, the model cable television ordinance, to which any prospective licensee would be contractually bound, evidenced the proprietary character of the City's acts.[6]

IV. Under A Proper Application of City of Lafayette, The City Of Boulder Is Not Entitled To Antitrust Immunity In This Case.

The Tenth Circuit should have applied the test for state action antitrust immunity for political subdivisions as exemplified by the doctrine of *City of Lafayette*. The *City of Lafayette* Court held that municipalities must satisfy two conditions in order to avail themselves of state action immunity. First, the municipality must be acting pursuant to a clearly articulated, affirmatively expressed "state policy to displace competition with regulation or monoply public service," 435 U.S. at 413. Second, the municipality must demonstrate "from the authority given . . . [the municipal government by the state legislature] to operate in a particular area, that the legislature contemplated the kind of action complained of." *Id.* at 415, *quoting City of Lafayette v. Louisiana Power & Light Co.*, 532 F.2d 431, 434 (5th Cir. 1977).

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[6] The ordinance included the following terms: an increase in permit price from 2% to 5% of the licensee's annual gross revenues; the city's reservation of the right to approve every contract negotiated by the licensee, including contracts on program content; and the city's unconditional right to buy out and assume control of the licensee.

A. THE STATE POLICY REQUIREMENT WAS NOT SATISFIED.

Colorado has no statutory, administrative or constitutional policy in clear, affirmative terms to displace competition in the cable television industry with regulation or monopoly public service. The most charitable characterization of state policy on competition within the cable television industry is that it is neutral.[9]

Finding no statutory[10] or administrative[11] expression of policy, the Tenth Circuit identified the 1912 Home Rule Amendment of the Colorado Constitution, COLO.

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[9] *But see* Colorado Antitrust Statute, COLO. REV. STAT. §§ 6-4-101, 6-4-102 (1974 & Supp. 1979) which establishes a general policy of competition throughout the State of Colorado.

[10] A related statute is one granting Colorado municipalities authority to regulate municipal streets and rights-of-way, COLO. REV. STAT. § 31-15-702 (1)(a)(VI) (1974). The statute is silent on cable television and competition. Broad statutory authorization has been held inadequate to express a policy to displace competition in a particular area of the marketplace. *See, e.g., Duke & Co. v. Foerster*, 521 F.2d 1277, 1281 (3d Cir. 1975) (statutory authority to establish and operate airport, auditorium, and stadium did not express policy to boycott certain suppliers); *Grendel's Den, Inc. v. Goodwin*, 495 F. Supp. 761, 769 (D. Mass. 1980) (statute granting church and school officials veto power over liquor license applications did not express anticompetitive policy); *Guthrie Aircraft, Inc. v. Genessee County*, 494 F. Supp. 950, 956 (W.D.N.Y. 1980) (statutory authority to establish and operate airport did not express policy to revoke license of fixed base operator and grant monopoly license to competitor); *Mason City Center Associates v. City of Mason City, Iowa*, 468 F. Supp. 737, 742 (N.D. Iowa 1979) (general authority to zone did not express anticompetitive policy).

[11] The absence of an administrative policy is clear from the refusal of the Colorado Public Utilities Commission to regulate cable television systems absent legislative direction. *Re The Mountain States Telephone & Telegraph Co.*, 73 P.U.R.3d 161, 174-75 (Colo. Pub. Util. Comm. 1968). *See Mobilfone of Northeastern Pennsylvania, Inc. v. Commonwealth Telephone Co.*, 571 F.2d 141 (3d Cir. 1978); *TV Pix, Inc. v. Taylor*, 301 F. Supp. 459 (D. Nev. 1968), *aff'd per curiam*, 396 U.S. 556 (1970).

CONST. art. XX, § 6, as the basis for a state policy to eliminate competition in the cable television industry: "The [state] policy was affirmatively expressed through the language of the [municipal home rule] ordinance." 630 F.2d at 708.

The Home Rule Amendment provides, in pertinent part:

> [S]uch [home rule] city or town, and the citizens thereof, shall have the powers set out in sections 1, 4 and 5 of this article, and all other powers necessary, requisite or proper for the government and administration of its *local and municipal matters,* including power to legislate upon, provide, regulate, conduct and control:
>
> a. The creation and terms of municipal officers, agencies and employments . . . ;
>
> b. The creation of police courts . . . ;
>
> c. The creation of municipal courts . . . ;
>
> d. All matters pertaining to municipal elections . . . ;
>
> e. The issuance, refunding and liquidation of all kinds of municipal obligations . . . ;
>
> f. The consolidation and management of park or water districts . . . ;
>
> g. The assessment of property . . . and collection of taxes thereon . . . ;
>
> h. The imposition, enforcement and collection of fines and penalties for the violation of any of the provisions of the charter, or of any ordinance adopted in pursuance of the charter.
>
> It is the intention of this article to grant and confirm to the people of all municipalities coming within its provisions the full right of self-

> government in both *local and municipal matters* and the enumeration herein of certain powers shall not be construed to deny such cities and towns, and to the people thereof, any right or power essential or proper to the full exercise of such right.
>
> The statutes of the state of Colorado, so far as applicable, shall continue to apply to such cities and towns, except insofar as superseded by the charters of such cities and towns or by ordinance passed pursuant to such charters.
>
> * * *
>
> This article shall be in all respects self-executing.

COLO. CONST. art. XX, § 6 (emphasis added).

First, the only state policy expressed by the Home Rule Amendment is that home rule municipalities shall have authority to declare *municipal* policy, i.e., policy over "local and municipal matters." Assuming *arguendo* that the regulation of the conduct of a cable television business is a "local and municipal matter" and that Boulder's conduct was a lawful exercise of municipal home rule authority, it does not follow that Boulder's conduct expresses *state* policy. "[I]t cannot be maintained that every municipal act that meets the lawful-under-state-law standard necessarily comports with any reasonably defined notion of state 'policy.'" *The State Action Antitrust Defense for Local Governments: A State Authorization Approach,* 12 URB. LAW. 325 (1980) [hereinafter cited as *a State Authorization Approach*]; *accord, City of Lafayette,* 435 U.S. at 414 n.44, 415 n.45; *New York State Electric & Gas Corp. v. Federal Energy Regulatory Commission,* No. 79-4185 (2d Cir. Sept. 30, 1980); *see City of Fairfax v. Fairfax Hospital Association,* 562 F.2d 280, 285 (4th Cir. 1977), *vacated & remanded on other grounds,* 435 U.S. 992 (1978); *In re Airport Car Rental Antitrust Litigation,*

474 F.Supp. 1072 (N.D. Cal. 1979). If lawful conduct by a home rule municipality always expressed state policy, then a home rule ordinance declaring Tuesdays and Fridays as garbage pick-up days would proclaim state policy, as would an ordinance requiring leashes on pets.[12]

Second, since the state legislature has authority to express state policy on cable television but has elected not to do so, state policy is neutral. *See Cantor v. Detroit Edison Co.*, 428 U.S. 579, 585 (1976). The Colorado Public Utilities Commission has acknowledged the state legislature's authority to express state policy on cable television. *Re The Mountain States Telephone & Telegraph Co.*, 73 P.U.R. 3d 161, 174-75, (Colo. Pub. Util. Comm. 1968). The state legislature has authority to express some cable television policy, because the subject is of a mixed national, state, and local concern.[13] Although no Colorado Court has had occasion to characterize cable television regulation as purely local, purely state, or mixed state and local,[14] it is clear that the mixed state and local classification would attach, given that off-air signals and microwave signals from television programs originating outside of Boulder

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[12] Mere state acquiescence or approval is inadequate to demonstrate a clearly articulated, affirmatively expressed state policy. *See Cantor v. Detroit Edison Co.*, 428 U.S. 579, 585 (1976); *Interconnect Planning Corp. v. American Telephone & Telegraph Co.*, 465 F. Supp. 811, 813 (S.D.N.Y. 1978).

[13] The Tenth Circuit erroneously intimated that cable television licensing was a purely local concern. If the Tenth Circuit correctly classified cable as a purely local concern, then under state law, there could be no state policy. *See Vela v. People*, 174 Colo. 465, 484 P.2d 1204 (1971). *Manor Vail Condominium Association v. Town of Vail*, ... Colo. ...., 604 P.2d 1168 (1980), relied upon by the Tenth Circuit, did not classify cable as a purely local concern. The holding of *Manor Vail* was two-fold: (1) that the appellant, a cable television subscriber, was estopped from challenging a 1968 ordinance that set different rates for different classes of cable television subscribers, where it had known of the subscriber classification from the enactment of the ordinance, paid the charges, accepted service, and refrained from filing suit until the 1974 rate revision; and (2) that the 1974 ordinance

are transmitted across the municipal boundaries of Boulder, and are re-transmitted to Boulder residents by coaxial cable strung on utility poles belonging to an instrumentality that has been classifed as a purely state concern. *People v. Mountain States Telephone & Telegraph Co.*, 125 Colo. 167, 243 P.2d 397 (1952). Since urban blight is a subject of mixed state and local concern, *Denver Urban Renewal Authority v. Byrne*, 9 Colo. Law. 743, ... Colo. ....., ... P.2d ..... (Oct. 27, 1980), surely cable television, a telecommunications medium affecting interstate commerce, *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968), is a mixed state and local concern as well.

Third, the potential variety of cable television policies among Colorado's home rule municipalities belies the expression of a state policy. *See generally A State Authorization Approach, supra* at 333. The *City of Lafayette* plurality declared that when cities are "equally free to approach a policy decision in their own way, . . . [state policy is] neutral." 435 U.S. at 414-15; *accord, Kurek v. Pleasure Driveway & Park District of Peoria, Illinois*, 557 F.2d 580, 590 (7th Cir. 1977), *vacated & remanded*, 435 U.S. 992,

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which revised rates but maintained the practice of setting different rates for different classes of cable television subscribers did not violate the due process clause or the equal protection clause of the fourteenth amendment. Nor did *TV Pix, Inc. v. Taylor*, relied upon by the Tenth Circuit, hold the licensing of cable companies to be a purely local concern. The holding of *TV Pix* was that a Nevada statute declaring cable television a public utility subject to regulation by the Nevada Public Service Commission was not per se an unconstitutional burden on interstate commerce. 304 F. Supp. at 464.

[14] The classification of a subject as a purely local, purely state, or mixed state-local concern determines the relative authority of the state and local governments over such subject. On subjects of purely local concern, the municipal ordinance governs. On subjects of purely state concern, the state statute governs. And on subjects of mixed state-local concern, a statute and ordinance may co-exist; but if they conflict, the statute prevails. *See, e.g., DeLong v. City & County of Denver*, 195 Colo. 27, 31, 576 P.2d 537, 540 (1978).

aff'd per curiam on remand, 583 F.2d 378 (7th Cir.), *cert. denied,* 439 U.S. 1090 (1978).

B. THE STATE MANDATE REQUIREMENT WAS NOT SATISFIED.

To satisfy the state mandate test, the municipality must demonstrate "from the authority given . . . [the municipal government by the state legislature] to operate in a particular area, that the legislature contemplated the kind of action complained of." 435 U.S. at 415. Such legislative contemplation "may be demonstrated by explicit language in state statutes, or may be inferred from the nature of the powers and duties given to a particular government entity." *Duke & Co. v. Foerster,* supra, 521 F.2d at 1280.

The Colorado Legislature has never explicitly contemplated municipal restraints on cable television competition. Cable television is not among the eight enumerated powers in the Home Rule Amendment. Nor is there any explicit reference in the Home Rule Amendment to any anti-competitive municipal conduct, much less anti-competitive conduct related to cable television. *See Princeton Community Phone Book, Inc. v. Bate,* 582 F.2d 706, 717 (3d Cir.), *cert. denied,* 439 U.S. 966 (1978) (New Jersey Supreme Court rule barring attorney advertising expressly contemplated anti-competitive effect); *Shrader v. Horton,* 471 F. Supp. 1236, 1242 (W.D. Va. 1979), *aff'd per curiam,* 626 F.2d 1163 (4th Cir. 1980) (state law expressly directed mandatory water hook-up ordinance); *Beckstein v. Hartford Electric Light Co.,* 479 F. Supp. 417, 421 (D. Conn. 1979) (Connecticut Public Utilities Commission expressly orderd public utility to increase rates); *Caribe Trailer Systems, Inc. v. Puerto Rico Maritime Shipping Authority,* 475 F. Supp. 711, 722 (D.D.C. 1979) (Puerto Rico Legislature expressly directed monopolization of shipping trade).

Nor has the state legislature implicitly contemplated municipal restraints on cable television competition. Outside of the enumerated powers, the Home Rule Amendment is such a broad mandate that it contemplates nothing with particularity. The City of Boulder engages in *reductio ad absurdum,* if it argues that by contemplating nothing, the Home Rule Amendment contemplated all. *See* Note, 65 GEO. L. J. 1547, 1589 (1977); *A State Authorization Approach, supra* at 335. If the Court were to accept this position, state legislatures would have the authority to endow all municipalities with blanket immunity, precisely the result the Court sought to avoid in *City of Lafayette. See Woolen v. Surtran Taxicabs, Inc.,* 461 F. Supp. 1025, 1031 (N.D. Tex. 1978).

Lower courts have been unwilling to infer from such a broad mandate an intent to immunize particular acts from antitrust scrutiny. Indeed, post-*City of Lafayette* decisions have construed the state mandate test as requiring contemplation of (1) a particular kind of act and (2) the anti-competitive effects flowing from such act. *See, e.g., United States v. Texas State Board of Public Accountancy,* 592 F.2d 919, 920 (5th Cir. 1979), *cert. denied,* 444 U.S. 832 (1980) ("the connection between this granted power and the Board's use of it is too tenuous to permit the conclusion that the legislature intended its scope of activity to encompass an anti-competitive regulation"); *Feminist Women's Health Center, Inc. v. Mohammad,* 586 F.2d 530, 550 (5th Cir. 1978), *cert. denied,* 444 U.S. 924 (1980) (Director of Florida Board of Medical Examiners was not acting within the intended scope of his statutory authority by pressuring doctors to cease practice absent unethical or illegal conduct by doctors); *Guthrie Aircraft, Inc. v. Genesee County,* 494 F. Supp. 950, 956 (W.D.N.Y. 1980) (state statute granting county broad power to operate airport did not contemplate the county awarding defendant exclusive rights as

fixed base operator); *Pinehurst Airlines, Inc. v. Resort Air Services, Inc.*, 476 F. Supp. 543, 554 (M.D.N.C. 1979) (same holding as *Genesee County); Star Lines, Ltd. v. Puerto Rico Maritime Shipping Authority*, 541 F. Supp. 157, 166 (S.D.N.Y. 1978) ("the legislature must direct its instrumentality to engage in a particular type of anti-competitive activity"); *Virginia Academy of Clinical Psychologists v. Blue Shield of Virginia*, 624 F.2d 476, 482 n.10 (4th Cir. 1980), *petition for cert. filed*, 49 U.S.L.W. 3456 (Dec. 23, 1980) (No. 80-930) (state law assigning territories to insurers did not contemplate insurers' agreement restricting insurance coverage for psychological services to such services which are ordered, supervised, and billed by physicians).

Colorado's Home Rule Amendment contemplates neither the kind of act at issue here, revocation of cable permit by enactment of municipal ordinances, nor the anti-competitive effects of such act, geographical restriction upon and potential monopolization of the market.[15] "[T]here is no indication that the state required, or even suggested, the manner in which," *In re Airport Car Rental Litigation*, 474 F. Supp. at 1096, the home rule authority would be exercised. *See Woolen v. Surtran Taxicabs, Inc.*, 461 F. Supp. 1025, 1035 (N.D. Tex. 1978).

In view of the incorporation of the Colorado Antitrust Statute, COLO. REV. STAT. §§ 6-4-101, 6-4-102 (1974 and Supp. 1979), into the Home Rule Amendment, Boulder's

[15] There are only two cases involving home rule cities where lower courts have found the state mandate test satisfied: *Pueblo Aircraft Service, Inc. v. City of Pueblo, Colorado*, 498 F. Supp. 1205 (D. Colo. 1980), which expressly relies upon the Court of Appeals decision in the instant case; and *Glenwillow Landfill, Inc. v. City of Akron*, 485 F. Supp. 671 (N.D. Ohio 1979). *Glenwillow Landfill* is distinguishable from the instant case, in that the state courts had construed the statutes governing solid waste disposal as authorizing municipalities to regulate "the collection and disposal of solid waste within their borders — by monopoly if the city finds it appropriate." *Id.* at 677 (citations omitted).

anticompetitive conduct was not reasonably contemplated by the amendment. State antitrust "statutes evidence a state policy to subject cities to antitrust liability and make it impossible for a city to invoke the state action exemption absent clear, specific legislation authorizing the anticompetitive municipal conduct in question." Thomas, *City of Lafayette's State Action Test Reformulated: A Meaningful Standard of Antitrust Immunity for Cities*, 1980 ARIZ. ST. L.J. 345, 380 n. 154 (1980).[16] Although the Home Rule Amendment did not expressly subject home rule municipalities to state and federal antitrust laws, like the statute at issue in *Woolen v. Surtran Taxicabs, Inc.*, 461 F. Supp. 1025, 1031 (N.D. Tex. 1978),[17] the amendment did declare that "[t]he statutes of the state of Colorado, so far as applicable, shall continue to apply to such cities and towns. . . ." COLO. CONST. art XX, § 6. Since cable television regulation is a subject of mixed state and local concern, the Colorado Antitrust Statute is applicable.

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[16]Broader procompetitive language than that included in the Colorado Antitrust Statute has been the basis for two decisions in which the state mandate test was not satisfied. *See Guthrie Aircraft, Inc. v. Genesee County*, 494 F. Supp. at 955-56 (statute authorizing county control of airports provided that such airports must be operated "for the general use of the public and for the benefit of such city, county, village or town"); *Pinehurst Airlines, Inc. v. Resort Air Services, Inc.*, 476 F. Supp. at 554 (statute authorizing county control of airports provided that in awarding concessions, the county may not "[deprive] the public . . . of its rightful, equal, and uniform use thereof"). *But see Pueblo Aircraft Service, Inc. v. City of Boulder, Colorado*, 498 F. Supp. 1205 (D. Colo. 1980).

[17]The statute at issue in *Woolen* was the Municipal Airport Act, TEX. CIV. STAT. ANN. arts. 46d-1 to 46d-22 (Vernon 1969), which granted municipalities the authority to operate airports. Article 46d-7 (b) of the Act provided that "[n]o ordinance, resolution, rule, regulation or order by a municipality pursuant to this Act shall be inconsistent with, or contrary to, any Act of the Congress of the United States or laws of this State, or to any regulations promulgated or standards established pursuant thereto."

CONCLUSION

The Tenth Circuit decision wreaks chaos and confusion. Against the silence of the *City of Lafayette* plurality, and Chief Justice Burger's long record of strictly construing the state-action exemption, the Tenth Circuit has immunized all cities from antitrust liability so long as the challenged conduct is governmental rather than proprietary. Against the admonition by the *City of Lafayette* majority that the parochial economic interest of cities should not be permitted to overrule the national economic policy of free competition, the Tenth Circuit held that actions of home rule municipalities were to be treated as state action and entitled to blanket immunity under *Parker v. Brown*. Henceforth, so long as actions by city departments in home rule cities reflect municipal policy to displace competition, they are presumably to be immune from the antitrust laws. The Tenth Circuit's decision cries out for review.

Wherefore, premises considered, Petitioner prays that that the Supreme Court of the United States grant the petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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APPENDIX

COMMUNITY COMMUNICATIONS COMPANY, INC.,

Plaintiff-Appellee,

v.

CITY OF BOULDER, COLORADO, et al.,

Defendants-Appelants.

No. 80-1348.

UNITED STATES COURT OF APPEALS, TENTH CIRCUIT.

May 28, 1980.

Rehearing Denied October 1, 1980.

Before SETH, Chief Judge, SEYMOUR, Circuit Judge, and MARKEY, Judge*.

SETH, Chief Judge.

The plaintiff, who holds a non-exclusive franchise from the City of Boulder to engage in the cable television business in the City, brought this action against the City and another cable TV business entity. Some eleven causes of action are asserted. The complaint is directed to a City ordinance which placed a moratorium on expansion by the plaintiff in the City and to the action by the City in soliciting other cable TV business to engage in business under a proposed model ordinance. One of the causes of action asserted an antitrust violation, and this was the concern of the trial judge.

The plaintiff sought a temporary restraining order against the City to prevent its restriction on expansion. The trial court granted the order on the basis of the antitrust allegations. The defendant City has taken this appeal from the order.

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*Honorable Howard T. Markey, Chief Judge, United States Court of Customs and Patent Appeals, sitting by designation.

Before this court the central issue is whether the City is exempt from the anti-trust laws.

There were two principal actions taken by the City which were considered by the trial court without really differentiating between them. One was the 90-day moratorium on expansion by the plaintiff, and the second was the model ordinance for cable television in Boulder with the solicitation of new businesses to enter the market under the proposed ordinance. The 90-day moratorium was imposed by the City by a general ordinance and by the enactment of an ordinance directed specifically to the non-exclusive franchise of plaintiff. The restraining order issued was in general terms and was directed to any unilateral action by the City to restrict or revoke the authority of plaintiff to "conduct" its business in Boulder.

The trial court combined the two elements in the following summary of what the court considered Boulder to have done:

> "Most simply stated, Boulder has attempted to restrict the lawful business of CCC by preventing it from obtaining new customers for three months while potential competitors submit proposals for serving those same customers. The motivation may be to foster competition in the long run, but the direct and immediate effect is a restraint of trade and an artificial and unreasonable geographical market allocation."

The three-month period expired one day following the entry of the restraining order so we must assume that the trial court was considering the model ordinance as a substantial and continuing factor.

Of the model ordinance and the solicitation, the court was critical of the method or the way the matter was handled. The objection thus appears to be to the way it was done and not what was done. The following quotation from the trial court's order demonstrates this aspect of

the ruling and also shows how the trial court disposed of the *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315, contentions. The court of this said:

> "Assuming that Boulder does have the claimed authority to regulate cable television within the City in the manner which would be required to impose all of the terms and conditions in the draft ordinance which was submitted to the plaintiff and other cable companies, the approach taken is not an appropriate exercise and articulation of a policy of regulation. It is not characteristic of utility regulation for the regulating authority to negotiate with those to be regulated and then formulate the final policy by exercising legislative power through an offer and acceptance mechanism. It might well be a different case if Boulder had enacted an ordinance articulating qualifying criteria for cable companies to do business in the City, with such other regulations as the City government might believe to be necessary and proper in the exercise of police power, and then to confront the contention that such an ordinance has an anticompetitive effect. This is not this case. Here, upon the present record, *Parker v. Brown* is wholly inapplicable and Boulder is subject to antitrust liability under *City of Lafayette v. Louisiana Power & Light* [435 U.S. 989, 98 S.Ct. 1123, 55 L.Ed.2d 364], *supra* for the actions which it has taken."

We cannot agree that the method followed by the City somehow eliminated the *Parker v. Brown* considerations. We also cannot agree that the model ordinance with the solicitation and negotiations was somehow improper or beyond the authority of the City. This would not seem to be an issue in the case. The very same method apparently was followed by Vail in the *Manor Vail* case hereinafter considered, and the Colorado Supreme Court found nothing to comment on. In *Manor Vail Condominium Ass'n v.*

Town of Vail, 604 P.2d 1168 (Colo.), the Supreme Court of Colorado considered a rather broad challenge to an ordinance of the Town of Vail regulating cable television. A franchise had there been granted to a subsidiary of the plaintiff in this action. The ordinance also fixed rates under Colorado "home rule" authority. The company there sought to support the ordinance as a proper function of the town. The challenge basically was to categories established for rate making under the Constitution. The Colorado Supreme Court upheld the rate making as a valid exercise of regulatory authority. The court treated the issues as it would any regulatory authority exercised by the State of Colorado. Thus strict scrutiny compared to "legitimate state interest," was applied. The court also refers to the wide latitude to be afforded local governments in the exercise of police powers. The treatment of the rate issue in the *Manor Vail* case is significant to our problems here. The state court did not expressly discuss home rule, but assumed that the Town of Vail had full authority to regulate rates. The issue treated was how the regulation was carried out.

It is a mistake to generalize about "home rule" as it may be treated in opinions from different jurisdictions. We are concerned only with Colorado home rule under article XX, section 6, of the Colorado Constitution. The pertinent part reads:

> "Section 6. Home rule for cities and towns. The people of each city or town of this state, having a population of two thousand inhabitants as determined by the last preceding census taken under the authority of the United States, the state of Colorado or said city or town, are hereby vested with, and they shall always have, power to make, amend, add to or replace the charter of said city or town, which shall be its organic law and extend to all its local and municipal matters.

"Such charter and the ordinances made pursuant thereto in such matters shall supersede within the territorial limits and other jurisdiction of said city or town any law of the state in conflict therewith.

"It is the intention of this article to grant and confirm to the people of all municipalities coming within its provisions the full right of self-government in both local and municipal matters and the enumeration herein of certain powers shall not be construed to deny such cities and towns, and to the people thereof, any right or power essential or proper to the full exercise of such right.

"The statutes of the state of Colorado, so far as applicable, shall continue to apply to such cities and towns, except insofar as superseded by the charters of such cities and towns or by ordinance passed pursuant to such charters."

The trial court said during the hearing as to authority for the City of Boulder:

"THE COURT: If you get down to the ultimate source of the power, and governmental concepts, Boulder is exercising authority of the people of the state of Colorado in matters of local concern within Boulder, because the people of the state of Colorado exercising their ultimate sovereign power put Article 20 in the Constitution of this state. They are not operating under some delegated authority from the representatives in the general assembly. They are operating on the basis of the ultimate sovereign authority of the people of the state. That's what Colorado's Article 20 is all about."

The source of the authority of the City here is thus derived directly from the state constitution and is not a residual or delegated power. *See* the references in *City and County of Denver v. Henry*, 95 Colo. 582, 38 P.2d 895, to the situations where an ordinance may even supersede a state statute

as to matters of purely local concern. *See also Service Oil Co. v. Rhodus,* 179 Colo. 335, 500 P.2d 807, and *Davis v. City and County of Denver,* 140 Colo. 30, 342 P.2d 674. In any event, we are here concerned with City action in the absence of any regulation whatever by the State of Colorado. Under these circumstances there is no interaction of state and local regulation. We have only the action or exercise of authority by the City.

The Colorado Supreme Court has considered the scope of the Colorado version of home rule in several other cases including *Veterans of For. Wars, Etc. v. Steamboat Springs,* 575 P.2d 835 (Colo.), *Security Life and Accident Co. v. Temple,* 177 Colo. 14, 492 P.2d 63, and *Four-County Met. C.I. Dist. v. Board of County Com'rs.,* 149 Colo. 284, 369 P.2d 67. In the *Four-County Metro* case the court stated that the home rule cities in Colorado as to local matters had the complete authority.

The franchise of the plaintiff cable TV company is necessarily limited to service within the City of Boulder. The services provided are limited to City residents through the use of City streets and ways. The matter or subject is a local one. The Colorado court in the *Manor Vail* opinion assumed that the rate regulation of cable TV was a matter of local concern in the home rule context. *See also People v. Mountain States Tel. & Tel. Co.,* 125 Colo. 167, 243 P.2d 397. The Supreme Court in *TV Pix, Inc., v. Taylor,* 396 U.S. 556, 90 S.Ct. 749, 24 L.Ed.2d 746, affirmed a three-judge court decision (304 F.Supp. 459, D.Nev.) holding that the regulation of the community antenna system was a local business and did not constitute an interference with interstate commerce. The facts before us represent a comparable situation.

It would not seem useful under these circumstances to explore the differences between control by contract or by police power. The City is not in the television business in

any way, and whether by contract or police power the action is an exercise of governmental authority. There is no element of proprietary interest of the City.

[1] We must hold that under the Colorado Constitution and under the *Manor Vail* decision that the regulation of the business of cable TV is well within the power and authority of the City of Boulder. Further, under the circumstances the regulation here concerned was the only control or active supervision exercised by state or local government, and it represented the only expression of policy as to the subject matter.

The record contains a number of transcripts of City Council meetings. The discussions were extensive and the purpose of the moratorium and the model ordinance was made clear. There are also statements of purpose accompanying the ordinances. The City adopted a policy of fostering competition to receive a franchise for cable TV within the City, again a non-exclusive franchise. The moratorium was to permit these applications under circumstances where there remained a substantial number of customers not yet connected to the cable of the plaintiff. This appears to be a very clear statement of policy on the public record. Whoever obtained the franchise or the additional franchise would be required to operate under the model ordinance. The ordinance had been formulated after hearings, discussions and negotiations. The City had a consultant to give advice on the matter.

[2] We cannot agree with the trial court that the City is not exempt from antitrust liability under *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315. In *Parker* suit was brought to enjoin enforcement of a California state agricultural proration program which restricted competition among growers and maintained prices. The Supreme Court found that the restraints of the plan were imposed as an act of government, and that such "state action" is not prohibited by the Sherman Act.

The trial court here apparently concluded that *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 98 S.Ct. 1123, 55 L.Ed.2d 364, was controlling. However, in *Lafayette* the City was authorized to own and operate its electric utility. Louisiana Power & Light was sued by the City for anti-trust violations, and the utility counter-claimed under the Sherman Act for alleged anticompetitive activities. A divided Supreme Court ruled that the City was not immune from antitrust liability. The decision, considering the several opinions, was grounded on the fact that the action was not directed or authorized by the state "pursuant to state policy to displace competition with regulation or monopoly public service." 435 U.S. at 413, 98 S.Ct. at 1137.

City of Lafayette must be distinguished from the case before us because, as discussed above, no proprietary interest of the City is here involved. In any event, the statement of policy requirement in *Lafayette* has been met as indicated in the home rule discussion herein.

The Supreme Court holding in *California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc.* — U.S. —, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980), supports an application of the *Parker* exemption in these circumstances. The Court in *California Retail* set out two standards for governmental antitrust immunity: "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as State policy'; second, the policy must be 'actively supervised' by the State itself." (— U.S. at —, 100 S.Ct. at 943, *citing City of Lafayette, supra.*) This latest test for the *Parker* exemption has been met by the City of Boulder. The policy was affirmatively expressed through the language of the ordinances. The second part of the *California Retail* test was met by the active supervision and enforcement of the policy by imposition of the 90-day moratorium on construction and by issuance of civil and then criminal citations to cable workers when the moratorium was ignored.

We conclude that *City of Lafayette* is not applicable to a situation wherein the governmental entity is asserting a governmental rather than properietary interest, and that instead the *Parker-Midcal* doctrine is applicable to exempt the City from antitrust liability.

We must thus conclude that the trial court was in error as a matter of law as to the basis for issuance of the temporary restraining order. There is expressed no other basis for the restraining order than the antitrust factor.

In these circumstances we do not apply the usual standards outlined in *Penn. v. San Juan Hospital, Inc.*, 528 F.2d 1181 (10th Cir.); *Securities & Exchange Commission v. Pearson*, 426 F.2d 1339 (10th Cir.), and the typical cases.

[3] A temporary restraining order must be set aside although there may be no abuse of discretion as to the balance of equities or as to the matter of irreparable injury if the trial court has based its action to a substantial extent upon a determination of law which the appellate court considers to be in error. Of this doctrine the District of Columbia Circuit in *Northeast Construction Co. v. Romney*, 485 F.2d 752 (D.C.Cir.) said after referring to the broad discretion of the trial court as to the equities, irreparable injury, and related factors:

> "But a preliminary injunction must be reversed even where no abuse of discretion exists as to such matters, when the trial court has proceeded upon a premise as to the rule of law which the appellate court deems erroneous. We conclude that underlying the District Court's conclusion of law, that plaintiff is likely to succeed on the merits, is an erroneous legal premise that requires reversal."

See also United States v. School Dist. of Ferndale, 577 F.2d 1339 (6th Cir.); *Hamilton v. Butz*, 520 F.2d 709 (9th Cir.); *Grubbs v. Butz*, 514 F.2d 1323 (D.C.Cir.); *Society*

for Animal Rights, Inc. v. Schlesinger, 512 F.2d 915 (D.C.Cir.); and *Pullum v. Greene,* 396 F.2d 251 (5th Cir.).

Thus we must reverse the judgment and order of the trial court and remand the case. We also terminate our order entered in this action on May 9, 1980 which was directed to the plaintiff.

MARKEY, Chief Judge, dissenting.

With the greatest respect, I dissent. Though these remarks will not affect the course of Western Civilization, they are compelled by a conviction that the judgment below was eminently sound and unequivocally correct. Because, as set forth in its Memorandum Opinion and Order, the trial court committed no abuse of discretion, and because its judgment order is fully supportable on at least First Amendment grounds, I would affirm.

The Facts

In 1964, Boulder entered a 20-year, non-exclusive license-contract with a predecessor of plaintiff Community Communications Company (CCC), under which CCC was licensed to string cable throughout the city and to supply cable television (CATV) communications, that is, news, information, and entertainment, to Boulder's citizens. The contract is cancellable at will by the city. CCC has indisputably and at all times complied with that contract.

In 1973 and 1974, the city unsuccessfully sought bids for a cable operator to serve the entire city, to buy out CCC, and to submit to extensive regulation by the city.

In July of 1979, "Boulder Communications Company" (BCC), wrote the city, saying it had been formed by six citizens of Boulder, tendering a resolution under which it would receive a permit to build its system, stating that it would if permitted build its system, "whatever action the city takes in regard to [CCC]," stating its plan for stockholders of BCC to be Boulder citizens, and promising to supply Boulder with "the best that cable has to offer."

The city, though at all times fully free to do so, declined and still declines to grant BCC, or any other company, a non-exclusive license to compete with CCC in the cable market in Boulder. Though advised by its consultant that modern technology made open and free cable competition feasible, the city persisted in its position that only one cable operator could serve Boulder.

CCC's announcement of expenditures for expansion in Boulder were warmly applauded by the city's officials in May of 1979.

However, in the summer of 1979, the city re-launched its 1973-74 effort to find and install a cable operator which would serve the entire city and which would submit to broad control of its business by city officials.

The city decided that open competition would not produce the "best" cable TV operator, that it and not Boulder's cable consumers would decide which was "best," that there could be only one, and that the one must adhere to rigid controls by the city.

The city's Attorney advised that it lacked authority to impose those controls by regulations, but could do so using a bid-contract process in which the chosen company would agree to those controls.

The city drafted a "model ordinance" (contract) of twenty-two pages, to be entered by the one successful bidder, and giving the city pervasive controls of the selected cable operator's business, including its programming. Among the salient features of the model contract are:

> The city's right to purchase the cable company, at a price excluding good-will and limited to depreciated investment; the city's right of prior approval of every company contract; rate regulation; the city's right to

change rates at any time; a 5% franchise fee (two and one-half times the present fee); a requirement for five leased access channels; a compliant procedure monitored by the city manager, with a liquidated damage provision; a requirement to upgrade company facilities continually to state-of-the-art conditions; and a requirement for renegotiation, at specified intervals, of rate structures, free or discounted service, services provided, *programming offered,* and human rights.

In November, 1979, BCC again wrote the city, saying it was best qualified to serve Boulder, claiming support from citizen groups, stating a preference for an immediate permit under the city's "new policy ordinance." BCC accepted the "request for bid" situation, but warned that requesting bids would not solve legal "problems of an antitrust nature." BCC said the bid procedure would require that CCC's license be revoked, or that CCC agree not to expand (saying economics precluded more than one cable operator). Again denying the necessity for bids, BCC repeated its earlier offer to submit to the city's controls, and suggested that the city revoke CCC's license, offering in that event to purchase CCC's system. BCC closed with assurance that "there is no question that we are best suited to bring cable services to Boulder."

In December, 1979, fearing possible frustration of its plans, the city enacted ordinance 4473, imposing a 90-day moratorium on CCC's expansion, and ordinance 4472, repealing and reenacting CCC's license contract, with a section making CCC's continued operation in its existing area an "acceptance" of the 90-day moratorium and of the geographic restriction.

When CCC continued building, city authorities arrested its construction crews and tore down its cables.[1]

The city sought an injunction against CCC's expansion. An injunction was denied by Judge Neighbors, of the Boulder District Court. *City of Boulder v. Community Communications Company, Inc.*, No. 80-CV-0198. Noting that the federal court had assumed jurisdiction, Judge Neighbors added that he was not convinced the city would prevail on the merits, that the equities did not favor the city and that significant First Amendment issues were present.

In the present case, the district court issued this Order:

> ORDERED, that so long as the plaintiff, Community Communications Company, Inc., operates within the terms and conditions of Ordinance No. 2846, enacted October 6, 1964, [the original contract] the city of Boulder and all of its officers, agents, servants, employees, and attorneys are enjoined from taking any unilateral action to restrict, limit, or revoke the authority of the plaintiff to conduct its cable television business in the City of Boulder.

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[1] It is not necessary to question the sincerity of the city's officials, acting in the belief that they were better able than Boulder's cable consumers to determine which cable operator was the "best" for Boulder's citizens. The refusal to permit individual consumers to decide among competitors in open competition has here spawned delay in service of new consumers, arrests, equipment tear-down, two law suits, an appeal, continuing litigation, and the concomitant expense to all local and federal taxpayers. That harm may be caused by the sincere who would do good is but a price to be paid, lest no good be ever done. In this particular case, however, the circumstances tend to confirm the wisdom animating the Sherman Act, its national policy insistence on open, free competition, and its prohibition against unnecessary interference therewith.

The First Amendment

The judgment below will be affirmed on appeal if any basis for affirmance, whether or not relied on below, appears in the record. *Carpenters District Council v. Brady Corp.*, 513 F.2d 1, 4 (10th 1975); *see SEC v. Chenery Corp.*, 318 U.S. 80, 88, 63 S.Ct. 454, 459, 87 L.Ed. 626 (1943); *Casto v. Arkansas-Louisiana Gas Co.*, 597 F.2d 1323, 1325 (10th Cir. 1979); *Lindsey v. Dayton-Hudson Corp.*, 592 F.2d 1118, 1124 (10th Cir. 1979); *Fleming Building Co. v. Northeastern Oklahoma Building and Construction Trades Council*, 532 F.2d 162, 166 (10th Cir. 1976).

In my view, just such a basis for affirmance, compelling in its force and thrust, lies in the city's violation of the rights of speech and press guaranteed to CCC, and to the citizens of Colorado and of the United States who reside in Boulder, by the First Amendment.[2]

Though both the state and federal trial judges expressed concern over violation of First Amendment rights here, the former disposed of the city's requested injunction primarily on jurisdictional grounds and the latter granted CCC's requested injunction primarily on Sherman Act considerations.

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[2] Affirmance on First Amendment grounds avoids the constitutionality-risking interpretation of the Colorado constitution's "home rule" provisions found necessary by the majority to support absolute immunity of Colorado cities from the Sherman Act. Further, affirmance on First Amendment grounds avoids the concern expressed by Mr. Justice Blackmun in *City of Lafayette* for the effect on municipalities and their citizens of the Sherman Act's treble damage provisions.

The Colorado Attorney General's brief for *Amicus* State of Colorado, concentrating on Sherman Act considerations, "assumed *arguendo* that the first amendment may limit, but does not wholly prohibit" Boulder's authority.

That CATV is engaged in interstate commerce is clear. *United States v. Southwestern Cable Co.*, 392 U.S. 157, 168-169, 88 S.Ct. 1994, 2000-01, 20 L.Ed.2d 1001 (1968). That Boulder's reach for massive control of the CATV market within its borders is an interference with that commerce is to me equally clear. But, as recognized by the federal trial court, another "wider concern" is that for the First Amendment.[3]

Looking at the proposed model contract ordinance as the source of First Amendment concerns, and noting that the city had not yet engineered an acceptance of that contract, the trial court deemed its effect merely prospective and contented himself with a warning.[4] In my view, as injurious

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[3] Cable TV is a First Amendment speaker. See *Midwest Video Corp. v. FCC*, 571 F.2d 1025 (8th Cir. 1978) *(aff'd on other grounds sub nom. FCC v. Midwest Video*, 440 U.S. 689, 99 S.Ct. 1435, 59 L.Ed.2d 692 (1979); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 46 (D.C.Cir. 1977) *cert. den.* 434 U.S. 829, 98 S.Ct. 111, 54 L.Ed.2d 89 (1977); *Greater Fremont, Inc. v. City of Fremont*, 302 F.Supp. 652 (N.D.Ohio 1968) *aff'd sub nom. Wonderland Ventures, Inc. v. City of Sandusky*, 423 F.2d 548 (6th Cir. 1970); *Weaver v. Jordan*, 64 Cal.2d. 235, 49 Cal.Rptr. 537, 411 P.2d 289 (1966), and *Television Transmission, Inc. v. Public Utilities Commission*, 47 Cal. 2d 82, 301 P.2d 862, 865 (1956).

[4] Concerning the First Amendment, the trial judge said:

> Obviously there are wider concerns, including interstate commerce, giving rise to some uncertainty about the power of the state government in this regard, both in terms of an obstruction to interstate commerce, and with respect to the First Amendment rights of communicators.
>
> There are two other aspects of this case which are deserving of preliminary observations at this time. The plaintiff has attempted to use the shield of the First Amendment to avoid any interference from City government. That is an obvious overstatement of the law and an attempt to escape the reality that the messages it chooses to transmit must pass through a medium which is subject to some control by the City.

to First Amendment freedoms as the model would be, the 90-day moratorium was itself an impermissible prior restraint on the right to speak and hear.

In effect, by its "ordinances" 4473 and 4472, the city has said to CCC, "Thou shall not speak your truth to any Boulder citizens residing outside your present area of operation for 90 days." To Boulder citizens in those areas, the city has said, "Thou shall not for 90 days hear CCC's speech."[5] It is difficult to imagine a more flagrant and chilling inroad on cherished First Amendment freedoms.

While the defendant Boulder readily concedes that the First Amendment would prohibit its control of the content of these transmissions it does assert both the right and the responsibility for restricting the use of the public ways in this communications system. The question, of course, is what are the limits of that authority? If controlling content of the programs is beyond those limits, is it different, either in degree or in kind, for the City government to prescribe the number, variety, and scope of programming and services to be offered? And, is it appropriate for the City administration to say that the acceptability of a cable company rests on its willingness to contribute free services to that government or to such institutions or groups as may be considered to be in need of benefit or reward? Stated bluntly, may the City exact tribute for its favor?

While these questions are not now ripe for decision, they are potential problems in this developing situation. It is inappropriate to ascribe any illegal or improper intent to action which has not yet been taken, but it may be helpful to give caution about the potential consequences of that which may be contemplated. The City should carefully consider the need to exercise its authority by narrowly drawn regulations which do not unnecessarily interfere with First Amendment freedoms, as the Supreme Court has cautioned in *Village of Schaumburg v. Citizens for a Better Environment,* 441 U.S. 922, S.Ct. 2029, 60 L.Ed.2d 395.

[5] The trial court referred to "interested persons who are not before the court."

It is further difficult to visualize a valid defense to a charge in this case of violating CCC's First Amendment rights, and those of Boulder's citizens outside CCC's present operating area. Absence of concentration on the issue below would appear of little or no moment here, where there is no issue of material fact, and all relevant facts are of record. Before the moratorium, CCC had the right to speak outside its area. During the moratorium it did not.[6] When it tried to speak, it was arrested and its cables were torn down.

There is no police-power suggestion of concern for the public safety and welfare in CCC's use of Boulder's rights-of-way. Nor could there be, that factor being handled by the public utility, with whom CCC contracts for poles on which to string its cables.

On appeal, the city's sole defense is to pretend, disingeniously and contrary to the extensive, uncontradicted testimony and the specific findings of the trial judge, and contrary to its own City Attorney's advice, that cable is a "natural monopoly." The city's sole argument in this case is that because there can be only one cable operator in Boul-

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[6] Nor is CCC likely, under the city's plan, ever to speak again outside its present area. The city, after receiving the majority opinion, signaled its intent to impose a second moratorium. In its briefs here it repeated, ad nauseam, that its 90-day moratorium was merely "a one-time, temporary" delay in CCC's expansion. The city refused, however, to assure Judge Matsch that it would not impose second and continuing moratoriums if he denied the injunction. The city appealed the injunction interlocutorily, and moved to expedite, even though the moratorium expired the day after the injunction issued. Moreover, a failure to impose continuous moratoriums might, as the city elsewhere argues, allow CCC to "wire the entire city" and thus defeat the city's plan to grant either one monopoly for the entire city, or a number of monopolies, each in a specified district. Hence, the city must either abandon its present plan or it must continue to impose moratoriums on CCC's right to speak outside its present area.

der,[7] the moratorium was necessary to prevent CCC from "wiring the entire city" before the city could conduct its bid process and select what it considered the "best" company to enjoy that monopoly. Not to put too fine a point on it, that argument is today simply fallacious. As the trial judge found, and as the record makes clear, modern technology makes free and open competition both practically and economically available to the city by at least four competing cable communicators.[8]

Though the city may have difficulty getting a communicator who is not granted a monopoly of all or part of the city to submit to the massive controls of its "model ordinance," that fact could hardly justify the infringement of First Amendment freedoms inherent in its 90-day moratorium upon CCC's right to speak.[9]

Moreover, a desire to dictate who shall monopolize CATV communications in Boulder cannot serve as the articulated, compelling state or governmental interest required to justify an otherwise constitutionally prohibited silencing of the right of free speech and free press. That is true whether the awful sound of silence lasts for 9 days or 90 or 900.

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[7] The city says it considered, and may still consider, "districting," i.e., parceling out areas of the city to different cable operators. The effect on the First Amendment, however, is the same, for the city would be restraining each operator from speaking outside his assigned area, and would be dictating each consumer's choice, limiting it to the one cable operator chosen by the city to speak to that consumer.

[8] The trial court said:

> Under the present technology, more than one cable company can be on the same poles without adversely affecting the public ways. While there certainly are finite limits to overbuilding, those limits are something beyond two companies.

and again:

> I disagree that the evidence shows that cable television is such

The city says the moratorium does not regulate program "content," but a stifling of all content is the ultimate in content regulation.

The city says the trial court rejected CCC's "claim that the moratorium violated the First Amendment" as "an obvious overstatement of the law"—but it was an allegation that the First Amendment precluded "any interference" that was so characterized by the trial court. Note 4, *supra*. There may, of course, be limited compelling government interests permitting some interference, as the cases have shown. As above indicated, however, an insistence on maintenance of monopoly is not such an interest.

The city cites *NBC v. United States*, 319 U.S. 190, 226, 63 S.Ct. 997, 1014, 87 L.Ed. 1344 (1943), wherein the FCC's denial of a broadcasting license was affirmed, forgetting that the FCC is statutorily empowered and required to parcel out scarce airwaves, in the physically limited broadcast spectrum, as the Court so clearly stated. That situation is entirely different from the one before us. Cited also are *Conley Electronics Corp., v. FCC*, 394 F.2d 620 (10th Cir. 1968); *United States v. Southwestern Cable Co.*, 392 U.S. 157, 88 S.Ct. 1994, 20 L.Ed.2d 1001 (1968); *Great Falls Community Cable Co. v. FCC*, 416 F.2d 238, 240 (9th Cir. 1969); *Black Hills Video Corp. v. FCC*, 399

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a natural monopoly that the only feasible competition is in the process of currying favor with the City Council to obtain a permit to operate. To the contrary, the evidence is that there can be competition in the marketplace, with the choice of price and service let to the consumers.

[9] The city and Colorado's Attorney General cite the refusal of BCC and 2 other potential cable operators to compete unless they are granted a monopoly over all or part of the city as "evidence" that "economics" preclude open competition. That the operations of multiple competitors may result in one getting more customers than another, however, is an inherent element of, not an economic barrier, to competition. *United States v. Alcoa*, 148 F.2d 416, 430 (2d Cir. 1945).

F.2d 65, 69 (8th Cir. 1968); and *Buckeye Cablevision, Inc. v.* FCC, 387 F. 2d 220, 225 (D.C. Cir. 1967), for the proposition that courts have upheld intrusions "greater than that posed here." It is answer enough that all of those cases involved FCC controls over re-transmission of broadcast signals, and none involved the egregious choking off of a licensee's contractually-based right to speak to more people within its licensed area.[10]

Even in respect of the broadcast medium, where scarcity of broadcast channels both requires and justifies regulation, the Supreme Court has jealously guarded the First Amendment, saying, for example, "It is the right of viewers and listeners, not the right of the broadcasters, which is paramount. It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390, 89 S.Ct. 1974, 1806

[10] The city correctly says it cannot be forced to grant a license to "every operator that applies," but that is not to say that the city can unilaterally stifle the voice growth of an operator already licensed, for the sole purpose of enabling the city to choose a favorite monopolist or series of neighboring monopolists. Nor, assuming financial integrity and willingness to comply with police power regulations relating to use of the city's rights of way on the part of applicants, no reason is seen or cited why licenses should not be granted to those applicants.

[11] The city's brief repeats, in reference to the First Amendment, that its moratorium was to prevent CCC's monopolization and "to foster competition in" the marketplace. But the city could have done all that with ease by merely granting additional non-exclusive licenses. As established in the record, found by the trial judge, and not denied by the majority the moratorium, and its continuation, is critical to the city's effort to *prevent* competition and to *insure* monopolization, albeit by the monopolist its considers "best."

[12] The record of this interlocutory appeal reflects no intent by city officials beyond a desire to grant monopoly licenses to one

23 L.Ed.2d 371 (1969) (citations omitted). Here the city's actions, whether or not well-intentioned, reflected a callous and total disregard of "the right of the viewers and listeners," by preventing the 80-90% of Boulder's citizens outside CCC's operating area from receiving *any* cable communicator's ideas, until the city decides *which* one monopolist's ideas they will be permitted to hear.[11]

When, as studies show, the majority of our people get their news from television, I cannot, in First Amendment jurisprudence, and concerning action to still a growing voice, distinguish the dissemination of news and information by cable TV from that by newspapers.[12] Surely, an attempt by a city to use control of its streets and ways as a bludgeon to deny delivery of a newspaper to new subscribers for 90 days would be rapidly struck down on First Amendment grounds. The more so when it became clear that the denial was but a first step in a plan to insure the presence of only one newspaper, approved by the city and operating under the city's rigid control of its contracts and content.[13]

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or more "best" monopolists. An absolute freedom to stifle unilaterally the growth of a licensed communicator, because city officials disliked its programming or its editorial position in an upcoming election, for example, could certainly chill the exercise of that communicator's First Amendment rights. Like the power to tax, a unilateral, arbitrary power to stunt can also be the power to destroy.

[13] Colorado's constitution speaks of city autonomy in "local and municipal matters." The trial court and majority here refer to "local concern." CATV is not merely a local matter, *United States v. Southwestern Cable Co.*, 392 U.S. at 168-169, 88 S.Ct. at 2000-01, but if it were, that fact would be irrelevant to First Amendment implications. It is difficult to imagine a more local enterprise than a newspaper composed, edited, printed, and distributed within any of the thousands of communities like Boulder in the United States. Moreover a Colorado city's authority in relation to non-communication type activities must be carefully circumscribed when it is applied to restrict First Amendment rights.

Even when then-extant technology indicated that CATV might be a natural monopoly, the court said in *Home Box Office, Inc. v.* FCC, 567 F.2d 9 at 46:

> In any case, scarcity which is the result solely of economic conditions is apparently insufficient to justify even limited government intrusion into the First Amendment rights of the conventional press, *see Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 247-256, 94 S.Ct. 2831, 2834-38, 41 L.Ed.2d 730 (1974), and there is nothing in the record before us to suggest a constitutional distinction between cable television and newspapers on this point.

Further, in *Midwest Video v. FCC*, 571 F.2d 1025, 1053 (8th Cir. 1978) the court said:

> Government control of business operations must be most closely scrutinized when it affects communication of information and ideas, and prior restraints in those circumstances are presumptively invalid. See *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70, 83 S.Ct. 631, 639, 9 L.Ed.2d 584 (1963).

All the injunction on review prohibited was unilateral restriction by the city of CCC's right to "conduct its cable television business." In my view the quoted phrase is a synonym for CCC's right to "speak." I would affirm the injunction on First Amendment grounds.

The Contract Approach

It should be remembered that we deal here also with *contractual* rights. All of the involved "ordinances" are, in fact and by their terms, contracts. The trial court found that the city "finessed" an apparent "lack of regulatory authority" by "use of a contract approach," in the 90-day moratorium "ordinance" 4472. CCC and the city are parties to the original license contract. It is not even argued that CCC has failed to pay the city's fee or breached its original con-

tract in any way. All the present injunction does is to require that the city honor its existing contract so long as it is honored by CCC. The injunction could be sustained on that ground alone, without injection of either First Amendment or antitrust considerations.

Though the original contract is terminable at will by the city, the city did not terminate it, the city's attorneys having advised that it could not do so absent breach by CCC. The city does not here argue that its power to terminate justified the 90-day moratorium on CCC's effort to serve more consumers under its contract. Nor, would it seem, can the city be heard to assert a right to unilaterally amend the contract, from one covering the right to serve the 82,000 residents of Boulder to one covering only the right to serve 10-20% of those residents presently offered service by CCC.

Though the parties may acquire, after trial, an answer respecting the city's liability or immunity under the Sherman Act, we are here confronted with the sole question of whether this court should affirm the injunction against unilateral action by the city to prevent CCC from carrying out its lawful business under its original and continuing contract. Common principles of contract law and equity would appear to impel affirmance.

As the trial court said:

In summary, the plaintiff has established the need for a preliminary injunction for the protection of its business from irrevocable injury which could occur pending the final resolution of this dispute, under the standards set forth in *Continental Oil Company v. Frontier Refining Co.*, 338 F.2d 780 (10th Cir. 1964).[14]

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[14] That the trial court may have founded its judgment primarily on reasons deemed erroneous by the majority on appeal is not controlling. It is a judment we review, not reasons.

The Sherman Act[15]

Beginning at the beginning, that is, with the Constitution, Article VI, Clause 2, reads in pertinent part:

> This Constitution, and the laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding.

It would seem hardly arguable that the federal antitrust law is among "the laws of the United States" and was made "in Pursuance" of the Constitution. Nor would it seem that federal judges appointed under the Constitution are any less "bound thereby" than "the Judges" who preceded them chronologically "in every State." Nor can I believe that the 55 cities of Colorado, or the many thousands of cities in the United States, are any less bound than state and federal judges. Nor can I believe that a city ordinance can do what "the Constitution or Laws of any State" cannot do, namely the creation of new immunities from "the supreme Law of the Land."

In 1942, concentrating on whether Congress intended the Sherman Act to apply to state legislative action, the Supreme Court held in *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315, that nothing in the Act or its

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[15] The city has not yet been found guilty of violating the antitrust laws. We deal only with whether a city like Boulder may be enjoined from unilaterally restricting, limiting, or revoking plaintiff's lawful, contractual rights to operate its business. Though in my view the city's actions did violate the Sherman Act, and will probably be shown at trial to have done so, the majority opinion rests on immunity from suit, the violation being presumed. The brief of the Attorney General of Colorado argues persuasively against immunity, but is mistaken on the facts and therefore unpersuasive in arguing that there was no violation.

legislative history so indicated. Article VI not having been mentioned, it must be assumed that the Court, 38 years ago, considered the supremacy clause inapplicable in the absence of congressional intent that it be applied, in the particular case of the Sherman Act, to state legislation. Presumably, the alternative being nullification, the clause would require the states to avoid interference with application of the Act to "persons" and "corporations" within their borders. Indeed, unlike the facts here, the Court in *Parker* found no agreement or contract involved, and "no question of the state or its municipality becoming a partcipant in a private agreement or combination by others for restraint of trade." *Id.* at 351-52, 63 S.Ct. at 314.

Emphasizing our federalism, the Court in *Parker* said, "In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." *Id.* at 351, 63 S.Ct. at 313.

Whatever may or may not be said of the relationship, if any, between Article VI and the 1942 holding of the Court in *Parker*, it would appear clear that *Parker* created an *exception*. That exception is limited to *state* legislative action. Indeed, the Court said in *Parker:* "True, a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful," citing *Northern Securities Co. v. United States,* 193 U.S. 197, 332, 344-47, 24 S.Ct. 436, 454, 459-61, 48 L.Ed. 679 (1904), 317 U.S. at 351, 63 S.Ct. at 314.

Thirty-two years after *Parker,* the Court decided *Goldfarb v. Virginia State Bar,* 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975), saying, "anticompetitive activities must be compelled by direction of the State acting as a sovereign,"

Id. at 791, 95 S.Ct. at 2015. In *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 96 S.Ct. 3110, 49 L.Ed.2d 1141 (1976), the Court reaffirmed that to be exempt anticompetitive activity must implement a *statewide policy*. *Id.* at 585, 96 S.Ct. at 3115. In *Bates v. State Bar of Arizona*, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977), the Court said antitrust immunity can exist where a policy requiring anticompetitive conduct is part of a comprehensive regulatory scheme, clearly articulated, affirmatively expressed as state policy, and actively supervised by the state as policymaker. *Id.* at 362, 97 S.Ct. at 2698. In *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 98 S.Ct. 1123, 55 L.Ed.2d 364 (1978), the Court addressed state action immunity for cities. After noting the strong presumption against implied immunity, *Id.* at 398, 98 S.Ct. at 1129, the Court ruled that municipalities are not automatically immune solely because they are governmental entities, *Id.* at 411, 98 S.Ct. at 1136, and that it must appear "that the legislature contemplated the kind of action complained of." *Id.* at 415, 98 S.Ct. at 1138.[16]

In my view, Colorado home rule cities do not have antitrust immunity under *City of Lafayette* standards. No state policy whatsoever exists in relation to cable TV. The subject is not mentioned in Colorado's Constitution or in

[16] Post *Lafayette* jurisprudence has been in accord. *See e. g., United States v. Texas Board of Public Accountancy*, 464 F.Supp. 400 (W.D. Tex. 1978), *aff'd per curiam*, 592 F.2d 919 (5th Cir.), *cert. denied*, 444 U.S. 925, 100 S.Ct. 262, 62 L.Ed.2d 180 (1979) (no immunity, prohibiting accountants from competitive bidding was neither directed by nor within contemplation of state Accountancy Act, authorizing rules for maintaining high standards for accountants); *Mason City Center Associates v. City of Mason City*, 468 F.Supp. 737 (N.D.Iowa 1979) (no immunity, anticompetitive agreement in exercise of city's zoning power was not within direction or contemplation of state statute conferring zoning powers and authorizing zoning mechanisms); *Pinehurst Airlines, Inc. v. Resort Air Services, Inc.*, 476 F.Supp. 543 (M.D.N.C. 1979) (no immunity, county board's statutory

any state statute. The Colorado Public Utilities Commission has declined to exercise jurisdiction over cable television. *See In re Investigation and Suspension of First Revised Sheet No. 6 of Colorado PUC No. 5 of Mountain States Telephone & Telegraph Company*, decision No. 70749, 19 (January 25, 1968). With no policy whatever on regulation of cable TV, by cities or otherwise, it can hardly be said that Colorado has a state policy "to displace competition" in cable TV with regulation or monopoly public service. Much less can it be said that Colorado has a comprehensive, clearly articulated, affirmatively expressed, and actively state supervised anticompetitive policy for cable TV.

Hear [*sic*] the majority says that because Colorado has done nothing and because Colorado constitution gives its cities "home rule," the 55 cities of Colorado are free of the Sherman Act, that they are within their borders "sovereign," that they are to be treated as states and thus within the exception of *Parker*. The majority also says that *California Retail*, in which a city was controlled by a state, is applicable here, where a city is controlling itself. But the dual government, state sovereignty approach of *Parker* and *California* is inapplicable here. We are a nation not of "city-states" but of States.

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authority over airport did not authorize its prevention of airline becoming fixed base operator); *Whitworth v. Perkins*, 559 F.2d 378 (5th Cir. 1977), *vacated and remanded sub nom. City of Impact v. Whitworth*, 435 U.S. 992, 98 S.Ct. 1642, 56 L.Ed.2d 81 (1978), *cert. denied*, 440 U.S. 911, 99 S.Ct. 1224, 59 L.Ed.2d 460 (1979) (no immunity, city zoning ordinance allegedly part of conspiracy in restraint of trade); *Kurek v. Pleasure Driveway & Park District*, 557 F.2d 580 (7th Cir. 1977), *vacated and remanded*, 435 U.S. 992, 98 S.Ct. 1642, 56 L.Ed.2d 81 (1978), *reinstated on remand*, 583, F.2d 378 (7th Cir. 1978) *cert. denied*, 439 U.S. 1090, 99 S.Ct. 873, 59 L.Ed.2d 57 (1979) (no immunity, park district's statutory authority over golf courses did not exempt price fixing not within direction or authorization of the governing statute.

Not mentioned by the majority is *City of Denver v. Sweet*, 138 Colo. 41, 329 P.2d 441 (1958), in which the Colorado Supreme Court rebuked home-rule cities which "think of themselves as being like medieval city-states with plenary powers," adding, at 444-445:

> The United States Constitution provides for a national system of *states*. All powers not expressly granted to the federal government are reserved to the *states or to the people*. . . . Clearly our federal system does not envisage as a part thereof city-states. It therefore allows that home rule cities can be only an arm or branch of the state with delegated power. (emphasis in original)

"[A]nything in the Constitution [of Colorado] to the Contrary notwithstanding," I think the Sherman Act must be applied to Boulder, if we would not have the pieces of the pie be larger than the pie.[17]

The majority interprets the Court's denial of immunity in *City of Lafayette* as occasioned by the presence there of proprietary interest and the absence there of direction or authorization by the state pursuant to state policy to displace competition with regulation or monopoly public service. It then dismisses *City of Lafayette* by calling Boulder's contractual activity "an exercise of governmental authority" (a label applicable to any and all action by any government), and by substituting, in reliance on Boulder's "home rule" status, the city's policy, which it describes as "fostering competition to receive a franchise," for the required-but-absent state policy "to displace competition."

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[17] The Colorado constitution, as broadly and literally interpreted by the majority, would appear to render Boulder immune from the Sherman Act, and any other Act of Congress, at least insofar as the matter were viewable as one of "local concern," even if the state's policy was to encourage competition, and if state legislation prescribed adherence to the particular Act of Congress under review.

In *City of Lafayette*, the city owned and operated its electric utility. The plurality declined, however, the invitation to decide on that basis in the Chief Justice's concurring opinion. As Mr. Justice Marshall's concurring opinion emphasized, and the majority here appears to recognize, the "test established" in *City of Lafayette* is whether a city's action is "directed or authorized by the state 'pursuant to state policy to displace competition with regulation or monopoly public service.' "

If the city's direct enagagement in entrepreneurial activity had been so influential in *City of Lafayette*, the plurality would not, presumably, have required 22 pages to say so; nor would it have been required to explicate its "state policy to displace competition" rationale, nor would it have included the strong warnings against the implication of immunity.

Whatever guidance may be lurking in the lacuna of the five opinions in *City of Lafayette*, the key to its dismissal by the majority here appears to lie in the view that CATV is solely a matter of local concern. If that be so, the majority's literal interpretation of the Colorado constitution, its treatment of city action as state action, and its holding of absolute immunity from the reach of the Sherman Act, would display a surface logic. But, as the trial judge said, "there are wider concerns." The widest, as above indicated, is concern for First Amendment freedoms. The wider concern for the national policy of free and open competition should stay the hand of the courts in adding an exception for cities to the exception for states arising from *Parker v. Brown*. I would affirm the injunction, if necessary, on the grounds cited as a primary basis by the trial court, that is, that the city's conduct "in reasonable probability will be declared to be unlawful under the antitrust laws."

The Majority Opinion

The majority opinion is rooted in a perceived absolute immunity of the city from the federal antitrust laws, and, understandably, treats only that question. I remain sorely troubled, however, by what to me is a gnawing presence of negative pregnants.

First, the majority faults the trial judge for not differentiating between the "two principal actions" of the city.[18] But there was no reason to differentiate. The city's actions, like a man's legs, were of equal dimension and importance in the city's scheme. Moreover, as the majority recognizes, the moratorium expired the day after the injunction issued and the trial judge did differentiate, in considering the model ordinance and refusal to deny an intent to repeat the moratorium as substantial and continuing factors, which, as discussed above, they were and are.

Next, the majority faults the trial judge for objecting to the way things were done, not to what was done. But in its quote from the opinion below, the trial judge is pointing out that what was *done* was *not* "regulation," that what was *done* was *not* an exercise of the police power, and that what was *done was* an employment of the city's contracting function, which it unquestionably was.

The majority says the authority of the city is not an issue, but elsewhere says that whether the authority of the city encompasses an unlimited freedom to violate the

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[18] There were actually three actions: (1) Ordinance 4473, the 90-day moratorium and its enforcement; (2) Ordinance 4472, making plaintiff's continued service an acceptance; and (3) creation and offering the proposed model ordinance, giving the city total control-by-contract of the cable TV business in Boulder, as well as the right to eventual ownership of that business. The city was specifically and repeatedly advised by its attorneys that only by use of its contracting power might it escape a charge of antitrust violation.

Sherman Act is the central issue. The majority then cites the Colorado Supreme Court's *Manor Vail* decision, finding it pregnant with possible relation to this case, though the court nowhere mentions the Sherman Act in that decision.[19]

The majority then visualizes cable TV as purely a local matter, a view in conflict with the directly contrary holding of the Supreme Court in *United States v. Southwestern Cable Co.*, 392 U.S. 157, 168-169, 88 S.Ct. 1994, 2000-01, 20 L.Ed.2d 1001 (1968).[20]

Whatever may have been meant by dismissing the "differences between control by conrtact or police power" (the differences are substantial and on ocassion critical), the city is by its challenged ordinances very much "in the television business." The city's "ordinances" are, in fact and intent, *contracts*, reflecting a *proprietary* interest. In my view, as in that of the trial judge, the challenged actions of the city had nothing to do with public safety, the control of its ways being merely the weapon used to control

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[19] The nature of the activity under review is important. Rates applicable to all similarly situated were set by the city in *Manor Vail*. In the present case, some citizens were permitted service by CCC, while others were denied that service, and the city's actions were specifically designed and intended to insure a monopoly.

[20] The majority's citation of *TV Pix, Inc. v. Taylor*, 396 U.S. 556, 90 S.Ct. 749, 24 L.Ed.2d 746, as involving a situation comparable with this case appears strained. In *TV Pix*, the Supreme Court, by order and without comment, affirmed a judgment in which the district court, 304 F.Supp. 459 (D.C.Nev.), stated that cable TV *was* in interstate commerce but that its limited equipment regulation as a utility by the State did not unconstitutionally interfere with that commerce. That regulation was vastly different from the market control-by-contract attempted by the city here. Again, the federal antitrust law is nowhere mentioned in *TV Pix*.

entry to the cable market. Its actions were not government actions and were not an exercise of "governmental" authority. On the contrary, the city's "proprietary interest," and its desire to acquire a greater proprietary interest, permeated and dictated all of its actions here involved.

The majority then asserts that the city held discussions and hearings, stated its purposes, and employed a consultant, but elsewhere asserts that the issue is not the way things were done but what was done. And what was done was an apparent violation of the federal antitrust laws, as the majority confirms in its statement that "The city adopted a policy of fostering *competition to receive* a franchise, . . . " (my emphasis) that is, a competition *for* the market, not competition *in* the market. The relevance of the phrase, "again a nonexclusive franchise," like the city's insistence on calling its actions "pro-competitive", is difficult to understand in light of the city's unquestioned freedom at all times to grant additional non-exclusive franchises and its continued refusal to do so. The phrase may also be misunderstood if considered in any way related to the challenged city actions, which were an attempt to "restrict the lawful business" of plaintiff, having the "direct and immediate effect" of "a restraint of trade and an artificial and unreasonable geographical market allocation," as the trial judge correctly found.

As discussed above, I most respectfully disagree with the majority's effective adoption of the dissent in *City of Lafayette*. Nor can I find support for the result here in *California Retail*, which would permit immunity only when the restraint is "clearly articulated," "affirmatively expressed" and "actively supervised" by the *state*. The home rule status of Colorado cities, and the negative fact that state articulation, expression, and supervision are totally absent, cannot in my view make *California Retail* pregnant with pertinence here.

Lastly, though I agree that the trial court focused primarily on "the antitrust factor," this court should, as above indicated, take a broader view of the case.[21]

Treating the city's argument that it had the power of a state over local concerns, the trial court said:

> Obviously there are wider concerns, including interstate commerce, giving rise to some uncertainty about the power of the state government in this regard, both in terms of an obstruction to interstate commerce, and with respect to the First Amendment rights of communicators.

Recognizing that the city's total-control ordinance had not yet found a cable TV enterprise to accept it, but also recognizing the critical relationship of the moratorium and the model contract, the trial court cautioned:

> The City should carefully consider the need to exercise its authority by narrowly drawn regulations which do not unnecessarily interfere with First Amendment freedoms, as the Supreme Court has cautioned in *Village of Schaumburg v. Citizens for a Better Environment*, 441 U.S. 922, 99 S.Ct. 2029, 60 L.Ed.2d 395 (1979).

Attempting to follow this court's concern for equity in such circumstances, the trial court found CCC injury irreparable and balanced the equities, saying:

> If this lawsuit is finally decided in favor of the defendant City of Boulder, any injury which it may

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[21] The majority recognizes that the first moratorium terminated long ago, yet appears to focus solely on that action. Though I view that action alone as impermissible on First Amendment grounds (and note its intended and inevitable repetition by the city following issuance of the majority opinion), I submit that it cannot be viewed in a vacuum.

> sustain can be remedied by removal of the cables involved in the extension of the plaintiff's plant.
>
> . . .

In balancing the equities, the trial court did indicate that the city's "conduct" was such that it "in reasonable probability will be declared unlawful under the antitrust laws," but took a broader look:

> What equity requires here is that the plaintiff be protected in the exercise of the lawful rights which it had prior to the conduct which in reasonable probability will be declared to be unlawful under the antitrust laws. In considering the public interest and how it may be affected by this injunction, it is necessary to look beyond Boulder to the national policy of protecting free market competition.

In reversing the judgment below (i.e., in vacating the injunction order) the majority effectively holds that the city is at liberty to unilaterally prevent the exercise of plaintiff's lawful contract rights, and cannot be stopped from doing so to the irreparable harm of plaintiff, regardless of equity, even pending completion of trial. Moreover, as I view the outcome here, the city can do so without citing a single valid basis or reason.

Convinced that the city has shown no basis for its infringement of CCC's and Boulder's citizens' freedom of press and speech, of CCC's contract rights, and of CCC's right to compete freely and fairly in the marketplace, I must, with reluctance and with full recognition of personal capacity for error, respectfully decline to join the majority opinion.

Conclusion

The city of Boulder's interference with the lawful business of plaintiff, as part of a plan to manipulate and control the market for cable TV services in Boulder, with inherent and concomitant infringement of CCC's and cable

consumers' First Amendment rights, fully justified the injunction. I would set aside Sherman Act considerations on this appeal and affirm the injunction order on First Amendment grounds.

COMMUNITY COMMUNICATIONS COMPANY, INC., a Colorado Corporation, doing business as Boulder Cable T.V.,

Plaintiff,

v.

CITY OF BOULDER, COLORADO, a Municipal Corporation, Boulder Communications Co., a partnership, Thomas Cross, Jack Kerner, Michael Thompson, Donald Passalaqua, Barry Telleen, and Dennis DuBe,

Defendants.

Civ. A. No. 80-M-62.

UNITED STATES DISTRICT COURT, DENVER, COLORADO

March 17, 1980.

MEMORANDUM OPINION AND ORDER

MATSCH, District Judge.

The plaintiff, Community Communications Company, Inc., (CCC), moved for a preliminary injunction to prevent the City of Boulder from restricting or revoking the rights which it claims from a revocable, nonexclusive permit granted to a predecessor company in 1964. That permit was issued in the form of an ordinance enacted by the Boulder City Council, as a franchise to use public ways in that city to string cables for a community antenna system, or cable television. The geographical area involved was the entire City of Boulder and the permitted use of public ways was for a period of twenty years, with the power to terminate reserved in the following language:

> SECTION 2. That the right, permit and privilege herein granted is subject to revocation by the City Council, at its pleasure, at any time . . . (Plaintiff's Exhibit No. 22)

Under that ordinance, CCC has provided cable television service to the University Hill area of Boulder, an area comprising approximately 20% of the City's residential units and blocked off from normal reception of Denver television stations. Up to February 1980, CCC provided basically only retransmission of television signals from Denver and from one station in Cheyenne, Wyoming. In February 1980, CCC established an earth station for the reception of remote channels via satellite. The result is a greatly increased access to a variety of programming, including movies, sports, and channels from distant major cities.

Up to late 1975, cable television throughout the country was concerned primarily with retransmission of television signals to areas which did not have normal reception, with some special local weather and news services originated by the cable operators. During the late 1970's however, satellite technology impacted the industry and prompted a rapid, almost geometric rise in its growth. As earth stations became less expensive, and "Home Box Office" companies developed, the public response to cable television greatly increased the market demand for such expanded services.

The "state of the art" presently allows for more than 35 channels, including movies, sports, FM radio, and educational, children's, and religious programming. The institutional uses for cable television are fast increasing, with technology for two-way service capability. Future potential for cable television is referred to as "blue sky", indicating that virtually unlimited technological improvements are still expected.

In May 1979, CCC wrote to the Mayor of Boulder advising her of its plans to expand cable television service to other areas of the City and to establish an earth station for satellite pick-up. To expand to new areas, CCC must contract with the public utilities for the use of their poles. Many such poles are jointly owned by the Public Service Co. and Mountain Bell Telephone Co., and a certain

amount of "communications space" is left available by them for use by cable companies. The utilities grant a license to the company, under which it must make advance payments if rearrangement of the poles is necessary to make room for the cables. This "pole rearrangement" is done by the utility company, after which CCC is free to string its cables. Contracts and pole rearrangements were being negotiated by CCC from May through the end of 1979.

Shortly after CCC's letter to the Mayor, a newly formed business organization, Boulder Communications Company (BCC), codefendant herein, expressed an interest in obtaining a permit and competing with CCC. In a letter to the City Manager, BCC outlined a proposal for a new system, acknowledging the presence of CCC in Boulder but stating that "(w)hatever action the City takes in regard to TCI, it is the plan of BCC to begin building its system as soon as feasible after the City grants BCC its permit." (Plaintiff's Exhibit 9)

The Boulder City Manager and City Council reacted to this development by initiating a review and reconsideration of cable television in view of the many changes in the industry since the 1964 ordinance. Accordingly, they hired a consultant, Robert Sample, and held a number of study meetings to develop a governmental response to these changes. The primary thrust of Sample's advice was that the City should be concerned about the tendency of a cable system to become a natural monopoly. Much discussion in the City Council centered around a supposed unfair advantage that CCC had because it was already operating in Boulder. Members of the Council, and the City Manager, expressed fears that CCC may not be the best cable operator for Boulder, but would nonetheless be the only operator because of its head start in the area. The Council wanted to create a situation in which other cable companies could make offers and not be hampered by the

possibility that CCC would build out the whole area before they even arrived.

The result of this process was enactment of an "emergency" ordinance on December 19, 1979 (Ordinance No. 4473), unilaterally amending the 1964 Ordinance under which CCC had been operating, by restricting CCC from expanding its area of service for a period of three months. On the same day, the Council enacted Ordinance No. 4472, which revoked the 1964 Ordinance and re-enacted it to include the same three month restriction. Both ordinances expressly stated that the purpose of this moratorium on construction was to give other cable companies an opportunity to make proposals to provide service to the City. The Boulder Council had accepted the view that such a restriction was necessary to prevent CCC from obtaining a competitive advantage by connecting up to new customers during the proposal and negotiation process. Additionally, while the Boulder Council was persuaded that it had some responsibility to regulate cable television, it had received legal advice which cast doubt upon its authority and which particularly cautioned about the possibility of violations of antitrust laws.

Apparently upon the view that any lack of regulatory authority could be finessed by the use of a contract approach, the City included the following language in Ordinance No. 4472:

> *SECTION 12.* The grantee shall signify its acceptance of the terms hereof by continuing to provide service to any customers presently served by the grantee . . . (Plaintiff's Exhibit No. 27)

As a part of the process of soliciting applications from interested cable companies, the City drafted a proposed model ordinance and submitted it to the cable television industry with the request that those who wished to make proposals to enter the Boulder market should give their

comments on that draft. The objective of the total process was to select those applications meeting the City's criteria, apparently including acceptance of regulatory powers, and then enter into a period of negotiation culminating in an agreed ordinance which could not later be attacked by the permittee.

The plaintiff claims that the revocation of its permit and the enactment of the new ordinance, with the moratorium, have adversely affected its business in ways which generate several claims for relief. The contention which is of primary importance for this motion for preliminary injunction is that the City has violated Section 1 of the Sherman Act (15 U.S.C. § 1). The plaintiff asserts that Boulder and BCC are engaged in a conspiracy to restrict competition by replacing the plaintiff with BCC. While the plaintiff has gathered some circumstantial evidence which might indicate such a conspiracy, that evidence is insufficient to establish a probability that the plaintiff will prevail on this claim.

What CCC has shown is that to influence competition Boulder unilaterally prevented further expansion of the geographical area of the plaintiff's business. Whether the intent is to promote new competition by assuring other cable companies that most of Boulder will remain available to them for possible first service, and then to permit competing companies to overbuild in the same geographical areas, or whether there is a more insidious motive to supplant CCC with a de facto monopoly, the motion for injunctive relief requires consideration of the impact on CCC. Is Boulder's action in imposing a moratorium an unlawful interference with the plaintiff's business and with free market competition?

The plaintiff concedes that it does not have an exclusive license and it recognizes that the City has the right to grant additional licenses to compete in the same geographical area. Under the present technology, more than

one cable company can be on the same poles without adversely affecting the public ways. While there certainly are finite limits to overbuilding, those limits are something beyond two companies.

[1,2] The City contends that its conduct here cannot be violative of the antitrust laws because it is exercising police powers and has immunity under the doctrine of *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, L.Ed. 315 (1943). That assertion requires an inquiry into the extent of Boulder's governmental authority. Clearly, the City has the right and responsibility to control and regulate the use of public ways. That is not disputed here. Accordingly, the City may impose such restrictions on the hanging of cables as may reasonably be necessary to protect the public and other franchise users of such property. Cable companies are entirely dependent upon their ability to use public ways for the cables necessary to transmit their programs. That obviously gives the City some leverage by controlling access to the consumer market. The scope of that leverage and the legality of its use are difficult questions.

Boulder is a home rule city under Article XX of the Colorado Constitution and claims broad regulatory power because there is a vacuum resulting from inaction by federal and state governments. Broadly stated, the people of Colorado have granted home rule cities autonomy in matters of local concern. Accordingly, though it is a municipality, the City of Boulder contends that it should be considered to have the power of state government as to such matters within its geographical area. There is no Colorado case which characterizes the operations of cable television companies as a matter of local concern. Obviously there are wider concerns, including interstate commerce, giving rise to some uncertainty about the power of the state government in this regard, both in terms of an obstruction to interstate commerce, and with respect to the First Amendment rights of communicators.

In *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 98 S.Ct. 1123, 55 L.Ed.2d 364 (1978), the Supreme Court held that both cities and states come within the reach of proscriptions of the Sherman Act and that the immunization under *Parker v. Brown*, *supra*, is limited to governmental acts. In the very recent opinion deciding *California Retail Liquor Dealers Assoc. v. Midcal Aluminum Inc.*, — U.S. —, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980), the Court emphasized that antitrust immunity can be claimed for governmental action only when the action is taken pursuant to a clearly articulated and affirmatively expressed policy, actively supervised by the state.

[3] Assuming that Boulder does have the claimed authority to regulate cable television within the City in the manner which would be required to impose all of the terms and conditions in the draft ordinance which was submitted to the plaintiff and other cable companies, the approach taken is not an appropriate exercise and articulation of a policy of regulation. It is not characteristic of utility regulation for the regulating authority to negotiate with those to be regulated and then formulate the final policy by exercising legislative power through an offer and acceptance mechanism. It might well be a different case if Boulder had enacted an ordinance articulating qualifying criteria for cable companies to do business in the City, with such other regulations as the City government might believe to be necessary and proper in the exercise of police power, and then to confront the contention that such an ordinance has an anticompetitive effect. That is not this case. Here, upon the present record, *Parker v. Brown* is wholly inapplicable and Boulder is subject to antitrust liability under *City of Lafayette v. Louisiana Power & Light*, *supra* for actions which it has taken.

[4] Boulder does not claim that CCC has violated any of the terms and conditions of its operating authority under the 1964 or the 1979 ordinances. The City has also con-

ceded that while it may have the right to revoke the plaintiff's permit without cause, it may not take that action for an unlawful purpose.

What has happened up to this time in this case is not unlike those cases in which there is a unilateral refusal to deal unless certain anticompetitive conditions are met. See, *Sahm v. V-1 Oil Co.*, 402 F.2d 69 (10th Cir. 1968) and *Milsen Co. v. Sutherland Corp.*, 454 F.2d 363 (7th Cir. 1971). There is also a similarity with those cases in which retailers or distributors were coerced into unlawful conditions or restrictions by their suppliers, the suppliers claiming that a contractual right to terminate allowed them to cancel a previous agreement and impose new terms. *Interphoto Corp. v. Minolta*, 295 F.Supp. 711 (S.D.N.Y.1969) and *Continental Distributing Co. v. Somerset Importers*, 411 F.Supp. 754 (N.D.Ill.1976). See also, *Perma-Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 88 S.Ct. 1981, 20 L.Ed.2d 982 (1968). Most simply stated, Boulder has attempted to restrict the lawful business of CCC by preventing it from obtaining new customers for three months while potential competitors submit proposals for serving those same customers. The motivation may be to foster competition in the long run, but the direct and immediate effect is a restraint of trade and an artificial and unreasonable geographical market allocation.

[5, 6] I am in agreement with the defendants' contention that the record does not establish any agreement or conduct which can be considered to be a per se violation of the antitrust laws. Accordingly, the rule of reason is applicable here. I disagree that the evidence shows that cable television is such a natural monopoly that the only feasible competition is in the process of currying favor with the City Council to obtain a permit to operate. To the contrary, the evidence is that there can be competition in the marketplace, with the choice of price and service left to the consumers.

There are two other aspects of this case which are deserving of preliminary observations at this time. The plaintiff has attempted to use the shield of the First Amendment to avoid any interference from City goverment. That is an obvious overstatement of the law and an attempt to escape the reality that the messages it chooses to transmit must pass through a medium which is subject to some control by the City.

[7] While the defendant Boulder readily concedes that the First Amendment would prohibit its control of the content of these transmissions, it does assert both the right and the responsibility for restricting the use of the public ways in this communications system. The question, of course, is what are the limits of that authority? If controlling content of the programs is beyond those limits, is it different, either in degree or in kind, for the City government to prescribe the number, variety, and scope of programming and services to be offered? And, is it appropriate for the City administration to say that the acceptability of a cable company rests on its willingness to contribute free services to that government or to such institutions or groups as may be considered to be in need of benefit or reward? Stated bluntly, may the City exact tribute for its favor?

While these questions are not now ripe for decision, they are potential problems in this developing situation. It is inappropriate to ascribe any illegal or improper intent to action which has not yet been taken, but it may be helpful to give caution about the potential consequences of that which may be contemplated. The City should carefully consider the need to exercise its authority by narrowly drawn regulations which do not unecessarily interfere with First Amendment freedoms, as the Supreme Court has cautioned in *Village of Schaumburg v. Citizens for a Better Environment*, — U.S. —, 100 S.Ct. 826, 63 L.Ed.2d 73 (1979).

[8, 9] In summary, the plaintiff has established the need for a preliminary injunction for the protection of its business from irrevocable injury which could occur pending the final resolution of this dispute, under the standards set forth in *Continental Oil Company v. Frontier Refining Co.*, 338 F.2d 780 (10th Cir. 1964). The final outcome of this matter is far from predictable given the difficult questions which I have discussed in this opinion, and given the fact that the Boulder City Council has not yet acted on the applications which have been submitted in the proposal process. While the primary function of a preliminary injunction is to preserve the status quo until a final determination of the rights of the parties, that cannot mean that the parties are frozen in the positions they occupied immediately prior to the filing of the complaint. The circumstances surrounding this case are very fluid and there are interested persons who are not before the court. What equity requires here is that the plaintiff be protected in the exercise of the lawful rights which it had prior to the conduct which in reasonable probability will be declared to be unlawful under the antitrust laws. In considering the public interest and how it may be affected by this injunction, it is necessary to look beyond Boulder to the national policy of protecting free market competition.

If this lawsuit is finally decided in favor of the defendant City of Boulder, any injury which it may sustain can be remedied by the removal of the cables involved in the extension of the plaintiff's plant. It is not necessary to require the posting of a bond in an amount sufficient to cover the cost of that removal because the City already has that protection under the 1964 ordinance. Accordingly, only a bond to meet the jurisdictional requirements of Rule 65 need be posted, in the nominal amount of $100.00.

Upon the foregoing, it is

ORDERED, that so long as the plaintiff, Community Communications Company, Inc., operates within the terms

and conditions of Ordinance No. 2846, enacted October 6, 1964, the City of Boulder and all of its officers, agents, servants, employees, and attorneys are enjoined from taking any unilateral action to restrict, limit, or revoke the authority of the plaintiff to conduct its cable television business in the City of Boulder.

Constitutional Provisions, Statutes, And Ordinances Involved

The Colorado Home Rule Amendment, COLO. CONST. art. XX, § 6:

The people of each city or town of this state, having a population of two thousand inhabitants as determined by the last preceding census taken under the authority of the United States, the state of Colorado or said city or town, are hereby vested with, and they shall always have, power to make, amend, add to or replace the charter of said city or town, which shall be its organic law and extend to all its local and municipal matters.

Such charter and the ordinances made pursuant thereto in such matters shall supersede within the territorial limits and other jurisdiction of said city or town any law of the state in conflict therewith.

Proposals for charter conventions shall be submitted by the city council or board of trustees, or other body in which the legislative powers of the city or town shall then be vested, at special elections, or at general, state or municipal elections, upon petition filed by qualified electors, all in reasonable conformity with section 5 of this article, and all proceedings thereon or thereafter shall be in reasonable conformity with sections 4 and 5 of this article.

From and after the certifying to and filing with the secretary of state of a charter framed and approved in reasonable conformity with the provisions of this article, such city or town, and the citizens thereof, shall have the powers set out in sections 1, 4 and 5 of this article, and all other powers necessary, requisite or proper for the government and administration of its local and municipal matters, including power to legislate upon, provide, regulate, conduct and control:

a. The creation and terms of municipal officers, agencies and employments; the definition, regulation

and alteration of the powers, duties, qualifications and terms or tenure of all municipal officers, agents and employees;

b. The creation of police courts; the definition and regulation of the jurisdiction, powers and duties thereof, and the election or appointment of police magistrates therefor;

c. The creation of municipal courts; the definition and regulation of the jurisdiction, powers and duies thereof, and the election or appointment of the officers thereof;

d. All matters pertaining to municipal elections in such city or town, and to electoral votes therein on measures submitted under the charter or ordinances thereof, including the calling or notice and the date of such election or vote, the registration of voters, nominations, nomination and election systems, judges and clerks of election, the form of ballots, balloting, challenging, canvassing, certifying the result, securing the purity of elections, guarding against abuses of the elective franchise, and tending to make such elections or electoral votes non-partisan in character;

e. The issuance, refunding and liquidation of all kinds of municipal obligations, including bonds and other obligations of park, water and local improvement districts;

f. The consolidation and management of park or water districts in such cities or towns or within the jurisdiction thereof; but no such consolidation shall be effective until approved by the vote of a majority, in each district to be consolidated, of the qualified electors voting therein upon the question;

g. The assessment of property in such city or town for municipal taxation and the levy and collection of taxes thereon for municipal purposes and special

assessments for local improvements; such assessments, levy and collection of taxes and special assessments to be made by municipal officials or by the county or state officials as may be provided by the charter;

h. The imposition, enforcement and collection of fines and penalties for the violation of any of the provisions of the charter, or of any ordinance adopted in pursuance of the charter.

It is the intention of this article to grant and confirm to the people of all municipalities coming within its provisions the full right of self-government in both local and municipal matters and the enumeration herein of certain powers shall not be construed to deny such cities and towns, and to the people thereof, any right or power essential or proper to the full exercise of such right.

The statutes of the state of Colorado, so far as applicable, shall continue to apply to such cities and towns, except insofar as superseded by the charters of such cities and towns or by ordinance passed pursuant to such charters.

All provisions of the charters of the city and county of Denver and the cities of Pueblo, Colorado Springs and Grand Junction, as heretofore certified to and filed with the secretary of state, and of the charter of any other city heretofore approved by a majority of those voting thereon and certified to and filed with the secretary of state, which provisions are not in conflict with this article, and all elections and electoral votes heretofere had under and pursuant thereto, are hereby ratified, affirmed and validated as of their date.

Any act in violation of the provisions of such charter or of any ordinance thereunder shall be criminal and punishable as such when so provided by any statute now or hereafter in force.

The provisions of this section 6 shall apply to the city and county of Denver.

This article shall be in all respects self-executing.

BOULDER, COLO., ORDINANCE NO. 2846
(Oct. 6, 1964)

AN ORDINANCE GRANTING A REVOCABLE PERMIT OF THE CITY OF BOULDER, TO COLORADO TELEVENTS, INC., A COLORADO CORPORATION, TO CONDUCT THE BUSINESS OF A COMMUNITY ANTENNA TELEVISION SYSTEM IN THE CITY OF BOULDER, FOR A PERIOD OF TWENTY YEARS; AND SETTING FORTH DETAILS IN RELATION THERETO.

WHEREAS, Colorado Televents, Inc., a Colorado corporation, with offices at 270 Columbine Street, Denver, Colorado, has made application to the City Council of the City of Boulder for a permit to conduct the business of a community antenna television system in said City of Boulder through the media of transmission by cables, and/or wires, or otherwise, commonly known as a Master Antenna Cable System, and;

WHEREAS, said cable system would be attached to poles whereby said cables, wires, and related appurtenances would cross over the streets, alleys, sidewalks, highways and other public ways and places of the said City of Boulder, and;

WHEREAS, the City Council is of the opinion that the operation of a community antenna television system is necessary so that those persons who are situated in the City so as not to get adequate television reception may receive the same; and,

WHEREAS, the City Council is of the opinion that the best and most practical method of providing said services is by granting to a private person or company, revocable authority and permission to operate such approved system upon terms and conditions prescribed and acceptable to the City.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF BOULDER, COLORADO:

Section 1. That there is hereby granted unto Colorado Televents, Inc., its successors and assigns, hereinafter referred to as the grantee, the right, permit and privilege, for a period of twenty (20) years from date of final adoption of this ordinance, to conduct the business of a Community Antenna Television System in said City of Boulder; and to erect, construct, operate and maintain on, under and above the present and future streets, alleys, highways and other public ways and places of the City of Boulder, such poles, lines, cables, wiring and related appurtenances as are necessary for the purpose of originating, receiving, amplifying and distributing television and radio signals to the inhabitants of the City of Boulder; save and except that the aforesaid rights and privileges shall be subject to the conditions, exceptions and limitations herein contained.

Section 2. That the right, permit and privilege herein granted is subject to revocation by the City Council, at its pleasure, at any time. In the event of revocation, termination or expiration of this permit the grantee shall at its own expense remove any poles, wires, cables and related appurtenances that shall have been erected and shall leave the streets, alleys, and public ways and places in as good condition as they were prior to said installation. To this end the grantee shall post a performance bond, as provided in Section 10 hereof.

Section 3. The right to use and occupy said streets, alleys and other public ways for the purposes herein set forth shall not be exclusive, and the City reserves the right to grant a similar use in said streets and alleys to any other person or persons. Wherever possible, the company shall use existing facilities of public utility companies, provided said grantee, or its assigns, first secures the permission and con-

sent of the aforesaid public utility companies concerned, to affix said cables or wires, or other apparatus to their pole facilities.

Section 4. Poles or towers shall be so erected so as not to interfere with the traffic over the streets and alleys, and the location of all poles, towers or other structures on public property shall be placed with prior written approval and under the supervision of the City of Boulder as to such location, giving consideration to the reasonable operation of the same; providing further, that such location on public property shall not be a vested interest, and the same shall be removed by the grantee whenever, in the sole determination of the City, the same restrict or obstruct the operation or location of said streets, alleys, or public places, or municipal or franchised utilities located therein.

Section 5. Any and all streets and sidewalks disturbed or damaged in the construction or maintenance of said cables, lines and other appurtenances shall be promptly repaired by the grantee, at its expense, and to the satisfaction of the City of Boulder.

Section 6. The grantee shall be subject to all ordinances now in force, or that may hereafter be enacted, relative to the use of the streets, alleys, sidewalks and public ways and places of the City of Boulder.

Section 7. The covenants, conditions and limitations of this permit shall be binding upon the successors and assigns of the grantee, and the right granted hereunder shall not be assigned or subleased by the grantee without the prior written approval of the City of Boulder.

Section 8. The City reserves the right to adopt, from time to time, in addition to the provisions herein contained, such ordinances as may be deemed necessary to the exercise of the Police power; provided, that such regulations shall be

reasonable and not destructive to the rights herein granted and not in conflict with the laws of the United States, the State of Colorado, or other local laws or regulations.

Section 9. The company hereby expressly agrees that it will save, keep harmless and defend the City of Boulder from any and all damages and liabilities it may have or sustain by reason of the construction, operation or maintenance of the system. This will be guaranteed to the City by a Public Liability and Property Damage Policy to the City in the amount of $100,000/$300,000. Public Liability, and $25,000/$50,000. Property Damage. Said policy to be negotiated and paid for by the grantee and kept in effect throughout the term of this permit.

Section 10. Within thirty (30) days after the final reading of this ordinance by the City Council, the grantee shall signify its acceptance of the terms herein by filing in the office of the Director of Finance of the City of Boulder, a bond in the sum of Five Thousand dollars ($5,000.00), to be executed by the grantee, with good and sufficient surety, running to and in favor of the City of Boulder, and conditioned upon the full and faithful performance of all the terms and conditions of the license or permit by said grantee, its successors and assigns, and upon the further condition that the City shall be saved harmless from any damage arising out of the exercise by said grantee, its successors and assigns, of the rights hereby conferred; and upon the expiration of 30 days after final reading and upon filing of said bond this license or permit shall be in full force and effect for the full term hereof. The requirement for bond running to the City of Boulder may be met by the grantee furnishing to the City a certificate, satisfactory to the Director of Finance and Record, showing that bond in like amount and for the same purposes and conditions as set forth herein has been furnished to a public utility company franchised by the City of Boulder.

Section 11. The grantee shall commence operations as a community antenna television system in the City of Boulder within three (3) years from the effective date of this ordinance, or shall otherwise forfeit all rights and privileges granted hereunder, but otherwise this permit to remain in full force and effect.

Section 12. As a further consideration of this permit or license, and in lieu of all occupation and license taxes or other taxes on the right to do business, the grantee agrees to pay on the 1st day of January annually to the City of Boulder a sum equal to two percent (2%) of its gross revenue derived from the conduct of its business within the corporate limits of the City or $100, whichever is the greater. The City shall have access to the grantees books and records to verify the amount due the City as reported by the grantee.

This ordinance shall take effect upon the expiration of thirty (30) days from adoption and publication in accordance with the Charter of the City of Boulder.

BOULDER, COLO., ORDINANCE NO. 4472
(Dec. 18, 1979)

AN ORDINANCE REPEALING ORDINANCE NO. 2846, REVOKING THE PERMIT TO CONDUCT THE BUSINESS OF A COMMUNITY ANTENNA TELEVISION SYSTEM GRANTED THEREUNDER; RE-ENACTING SAID ORDINANCE WITH TEMPORARY GEOGRAPHICAL LIMITATIONS UPON THE GRANTEE; GRANTING A REVOCABLE PERMIT TO COMMUNITY COMMUNICATIONS COMPANY, INC., UNDER SAID ORDINANCE; AND SETTING FORTH DETAILS IN RELATION THERETO.

WHEREAS, the City Council of the City of Boulder granted a revocable permit to Colorado Televents, Inc., in 1964 to conduct the business of a Community Antenna Television System in the City of Boulder; and

WHEREAS, said permit was transferred and assigned to its current holder, Community Communications Company, Inc., a wholly owned subsidiary of Community Tele-Communications, Inc., in 1966; and

WHEREAS, cable television companies have within recent months displayed interest in serving the community and have requested the City Council to grant permission to use the public right-of-way in providing that service; and

WHEREAS, the present permittee, Community Communications Company, Inc., has indicated that it intends to extend its services in the near future to an additional 35 miles of the City of Boulder right-of-way; and

WHEREAS, the City Council finds that such an extension of service by the current permittee would result in hindering the ability of other companies to compete in the Boulder market; and

WHEREAS, the City Council intends to adopt a model cable television permit ordinance, solicit applications from

interested cable television companies, evaluate such applications, and determine whether or not to grant additional permits in a reasonably short time, not to extend past March 18, 1980, and finds that an extension of service by the current permittee would result in a disruption of this application and evaluation process; and

WHEREAS, the City Council finds that placing temporary geographical limitations upon the operations of the current permittee would not impair the present services offered by Community Communications Company, Inc., to City of Boulder residents, and would not impair the ability of the current permittee to improve those services within the area presently served by it; and

WHEREAS, the City Council finds that it is in the public interest to repeal Ordinance No. 2846, to revoke the permit now held by Community Communications Company, Inc., to re-enact said ordinance with temporary geographical limitations, and to grant a revocable permit to Community Communications Company, Inc., under said ordinance as re-enacted.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF BOULDER, COLORADO:

Section 1. That Ordinance No. 2846 is hereby repealed, and the revocable permit granted thereunder to Colorado Televents, Inc. and its assignee, Community Communications, Inc., to conduct the business of a Community Antenna Television System in the City of Boulder is hereby revoked.

Section 2. That Ordinance No. 2846 is hereby reenacted to read as follows:

There is hereby granted unto Community Communications Company, Inc., a Colorado corporation and wholly owned subsidiary of Community Tele-Communications,

Inc., a Colorado corporation, its successors and assigns, hereinafter referred to as the grantee, the right, permit and privilege, until November 6, 1984, to conduct the business of a Community Antenna Television System in said City of Boulder; and to erect, construct, operate and maintain on, under and above the present and future streets, alleys, highways and other public ways and places of the City of Boulder, such poles, lines, cables, wiring and related appurtenances as are necessary for the purpose of originating, receiving, amplifying and distributing television and radio signals to the inhabitants of the City of Boulder; save and except that the aforesaid rights and privileges shall be subject to the conditions, exceptions and limitations herein contained.

Section 3. The City Council intends within a time not to extend past March 18, 1980, to adopt a model cable television permit ordinance, solicit applications from interested cable television companies, evaluate such applications, and determine whether or not to grant additional permits. During the pendency of this application and evaluation process, not to extend past March 18, 1980, the grantee's right, permit and privilege to erect, construct, operate and maintain on, under and above the present and future streets, alleys, highways and other public ways and places of the City of Boulder, such poles, lines, cables, wiring and related appurtenances as are necessary for the purpose of originating, receiving, amplifying and distributing television and radio signals to the inhabitants of the City of Boulder shall be exercised only within the geographical boundaries set forth in Exhibit A, attached to this ordinance and incorporated by reference herein.

It is the intent of this Section 3 that the grantee shall not expand its present system through working in the public right-of-way beyond the geographical areas presently served by the grantee during the effective period of this Section. In addition to any and all other remedies available to the City,

a violation of this Section shall be grounds for immediate revocation of the permit granted herein and forfeiture of the performance bond referred to herein.

This Section shall expire and be of no effect upon the completion of the application and evaluation process described herein, and in any case no later than March 18, 1980.

Section 4. The right, permit and privilege herein granted is subject to revocation by the City Council, at its pleasure, at any time. In the event of revocation, termination or expiration of this permit, the grantee shall, at its own expense, remove any poles, lines, cables, wiring, and related appurtenances that shall have been erected and shall leave the streets, alleys, highways and public ways and places in as good condition as they were prior to said installation. To this end the grantee shall post a performance bond as provided in Section 10 hereof.

Section 5. The right to use and occupy said streets, alleys, highways and other public ways and places for the purposes herein set forth shall not be exclusive, and the City reserves the right to grant a similar use to any other person or persons. Wherever possible, the company shall use existing facilities of public utility companies, provided said grantee, or its assigns, first secures the permission and consent of the aforesaid public utility companies concerned, to affix said lines, cables, wiring or related appurtenances to their pole facilities.

Section 6. Poles or towers shall be so erected so as not to interfere with the traffic over the streets, alleys, highways and other public ways and places, and all poles, towers or other structures placed on public property shall be placed with the prior written approval and under the supervision of the City of Boulder as to such location, giving consideration to the reasonable operation of the same; providing fur-

ther, that such location on public property shall not be a vested interest, and the same shall be removed by the grantee whenever, in the sole determination of the City the same restrict or obstruct the operation or location of said streets, alleys, highways, or other public ways or places, or municipal or franchised utilities located therein.

Section 7. Any and all streets and sidewalks disturbed or damaged in the construction or maintenance of said lines, cables, wiring or related appurtenances shall be promptly repaired by the grantee, at its expense, and to the satisfaction of the City of Boulder.

Section 8. The grantee shall be subject to all ordinances now in force, or that may hereafter be enacted, relative to the use of the streets, alleys, highways and other public ways and places of the City of Boulder.

Section 9. The covenants, conditions and limitations of this permit shall be binding upon the successors and assigns of the grantee, and the right granted hereunder shall not be assigned or subleased by the grantee without the prior written approval of the City of Boulder.

Section 10. The City reserves the right to adopt, from time to time, in addition to the provisions herein contained, such ordinances as may be deemed necessary to the exercise of the Police power; provided, that such regulations shall be reasonable and not destructive to the rights herein granted and not in conflict with the laws of the United States, the State of Colorado, or other local laws or regulations.

Section 11. The grantee hereby expressly agrees that it will save, keep harmless and defend the City of Boulder from any and all damages and liabilities it may have or sustain by reason of the construction, operation or maintenance of the activities permitted hereby. This will be guaranteed to the City by a Public Liability and Property Damage Policy to the City in the amount of $100,000/$300,000 for pub-

lic liability, and $25,000/$50,000 for property damage. Said policy shall be negotiated and paid for by the grantee and kept in effect throughout the term of this permit.

Section 12. The grantee shall signify its acceptance of the terms hereof by continuing to provide service to any customers presently served by the grantee. The grantee shall file in the office of the Director of Finance of the City of Boulder, a bond in the sum of Five Thousand dollars ($5,000.00), to be executed by the grantee, with good and sufficient surety, running to and in favor of the City of Boulder, and conditioned upon the full and faithful performance of all the terms and conditions hereof by said grantee, its successors and assigns, and upon the further condition that the City shall be saved harmless from any damage arising out of the exercise by said grantee, its successors and assigns, of the rights hereby conferred. The requirement for a bond running to the City of Boulder may be met by the grantee furnishing to the City a certificate, satisfactory to the Director of Finance and Record, showing that a bond in like amount and for the same purposes and conditions as set forth herein has been furnished to a public utility company franchised by the City of Boulder.

Section 13. As a further consideration of this permit or license and in lieu of all occupation and license taxes or other taxes on the right to do business, the grantee agrees to pay on the 1st day of January annually to the City of Boulder a sum equal to two percent (2%) of its gross revenue derived from the conduct of its business within the corporate limits of the City or $100, whichever is the greater. The City shall have access to the grantee's books and records to verify the amount due the City as reported by the grantee.

Section 14. If any part or parts hereof are for any reason held to be invalid, such shall not affect the remaining portions of this ordinance.

EXHIBIT A

An area described as follows:

A point at which the City limits of the City of Boulder on the West and the Northern boundary line of the National Bureau of Standards property intersect, East along the Northern boundary line of the National Bureau of Standards property to Broadway, North on Broadway to University Avenue, East on University Avenue to 17th Street, North on 17th Street to Canyon Boulevard, West on Canyon Boulevard to 9th Street, North on 9th Street to Spruce Street, West on Spruce Street to the Eastern boundary of Knollwood Village, North along the Eastern boundary of Knollwood Village to the City limits of the City of Boulder on the West, and South along the City limits to the point of beginning, plus any area used for any earth station and any area used for the transmission of signals from any earth station, to the area set forth above.

BOULDER, COLO., ORDINANCE NO. 4473
(Dec. 18, 1979)

AN EMERGENCY ORDINANCE AMENDING ORDINANCE NO. 2846 TO PLACE TEMPORARY GEOGRAPHICAL LIMITATIONS UPON THE GRANTEE; AND SETTING FORTH DETAILS IN RELATION THERETO.

WHEREAS, the City Council of the City of Boulder granted a revocable permit to Colorado Televents, Inc., in 1964 to conduct the business of a Community Antenna Television System in the City of Boulder; and

WHEREAS, said permit was transferred and assigned to its current holder, Community Communications Company, Inc., a wholly owned subsidiary of Community Tele-Communications, Inc., in 1966; and

WHEREAS, cable television companies have within recent months displayed interest in serving the community and have requested the City Council to grant permission to use the public right-of-way in providing that service; and

WHEREAS, the present permittee, Community Communications Company, Inc., has indicated that it intends to extend its services in the near future to an additional 35 miles of the City of Boulder right-of-way; and

WHEREAS, the City Council finds that such an extension of service by the current permittee would result in hindering the ability of other companies to compete in the Boulder market; and

WHEREAS, the City Council intends to adopt a model cable television permit ordinance, solicit applications from interested cable television companies, evaluate such applications, and determine whether or not to grant additional permits in a reasonably short time, not to exceed 3 months, and finds that an extension of service by the current permittee would result in a disruption of this application and evaluation process; and

WHEREAS, the City Council finds that placing temporary geographical limitations upon the operations of the current permittee would not impair the present services offered by Community Communications Company, Inc., to City of Boulder residents, and would not impair the ability of the current permittee to improve those services within the area presently served by it.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF BOULDER, COLORADO:

Section 1. That Ordinance No. 2846 is hereby amended by the addition of the following sections:

The City Council intends within a time not to exceed 3 months from the adoption of this ordinance to adopt a model cable television permit ordinance, solicit applications from interested cable television companies, evaluate such applications, and determine whether or not to grant additional permits. During the pendency of this application and evaluation process, not to exceed 3 months from the adoption of this ordinance, the grantee's right, permit, license and privilege to erect, construct, operate and maintain on, under and above the present and future streets, alleys, highways and other public ways and places of the City of Boulder, such poles, lines, cables, wiring and related appurtenances as are necessary for the purpose of originating, receiving, amplifying and distributing television and radio signals to the inhabitants of the City of Boulder shall be exercised only within the geographical boundaries set forth in Exhibit A, attached to this ordinance and incorporated by reference herein.

It is the intent of this Section 1 that the grantee shall not expand its present system through working in the public right-of-way beyond the geographical areas

presently served by the grantee during the effective period of this Section. In addition to any and all of the remedies available to the City, a violation of this Section shall be grounds for immediate revocation of the permit granted in Ordinance No. 2846 and forfeiture of the performance bond referred to therein.

This Section shall expire and be of no effect upon the completion of the application and evaluation process described herein, and in any case no later than March 18, 1980.

Section 2. The City Council finds that initiation of the application and evaluation process described herein is of immediate importance to the residents of Boulder, and that it is necessary to impose a temporary geographical limitation upon the grantee without delay. The City Council finds that an emergency exists, and that this ordinance is necessary for the preservation of the public peace, health, and safety.

Section 3. If any part or parts hereof are for any reason held to be invalid, such shall not affect the remaining portions of this ordinance.

EXHIBIT A

An area described as follows:

A point at which the City limits of the City of Boulder on the West and the Northern boundary line of the National Bureau of Standards property intersect, East along the Northern boundary line of the National Bureau of Standards property to Broadway, North on Broadway to University Avenue, East on University Avenue to 17th Street, North on 17th Street to Canyon Boulevard, West on Canyon Boulevard to 9th Street, North on 9th Street to Spruce Street, West on Spruce Street to the Eastern boundary of Knollwood Village, North along the Eastern boundary of Knoll-

wood Village to the City limits of the City of Boulder on the West, and South along the City limits to the point of beginning, plus any area used for any earth station and any area used for the transmission of signals from any earth station, to the area set forth above.

The Colorado Antitrust Statute, COLO. REV. STAT. §§ 6-4-101, 6-4-102 (1974 & Supp. 1980):

6-4-101. Illegal restraint of trade. Every contract or combination in the nature of a trust or conspiracy in restraint of trade or commerce is declared illegal. Every combination, conspiracy, trust, pool, agreement, or contract intended to restrain or prevent competition in the supply or price of any article or commodity constituting a subject of trade or commerce in this state, or every combination, conspiracy, trust, pool, agreement, or contract which controls in any manner the price of any such article or commodity, fixes the price thereof, or limits or fixes the amount or quantity thereof to be manufactured, produced, or sold in this state, or monopolizes or attempts to monopolize any part of the trade or commerce in this state, is declared an illegal restraint of trade.

6-4-102. Unlawful conspiracy. Every person, corporation, copartnership, trustee, or association who, either as principal or agent, makes any contract or engages in any combination, conspiracy, trust, pool, or agreement declared unlawful or an illegal restraint of trade under this article, or who combines or conspires with any other person, corporation, copartnership, association, or trustee to monopolize any part of the trade or commerce in this state is guilty of an unlawful conspiracy and, upon conviction thereof, shall be punished as provided in section 6-4-107.

The Municipal Powers Statute, COLO. REV. STAT. § 31-15-702 (1) (1974) provides in pertinent part:

31-15-702. Streets and alleys. (1) The governing body of each municipality has the power:

(VI) To regulate and prevent the use of streets, parks, and public grounds for signs, signposts, awnings, awning posts, and power and communications poles, and for posting handbills and advertisements; to regulate and prohibit the exhibition or carrying of banners, placards, advertisements, or handbills in the streets or public grounds or upon the sidewalks; and to regulate and prevent the flying of flags, banners, or signs across the streets or from houses. . . .

The Sherman Antitrust Act §§ 1, 2, 26 Stat. 209, as amended 15 U.S.C. §§ 1, 2 (Supp. 1980) :

§ 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

§ 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

The supremacy clause, U.S. CONST. art. VI, cl. 2:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

COLORADO PUBLIC UTILITIES COMMISSION

Re The Mountain States Telephone and Telegraph Company

Protestants: Colorado Municipal League, City of Colorado Springs, Silver King Cable Company, Pueblo T. V. Power, Incorporated et al.

I. & S. Docket No. 595, Decision No. 70749

January 25, 1968

By the COMMISSION: On September 1, 1967, The Mountain States Telephone and Telegraph Company, 930 Fifteenth street, Denver, Colorado, filed with the Public Utilities Commission of the state of Colorado a proposed change in its Colorado PUC No. 5 tariff. The proposed change was filed generally under the provisions of 1963 CRS 115-3-4 and 115-6-11 to become effective on statutory notice on October 1, 1967, unless suspended by the commission.

On September 12, 1967, the Colorado Municipal League filed a pleading with the commission denominated as a complaint, requesting the commission to suspend the proposed tariff change, conduct a hearing on the matter, and after hearing, enter an order permanently suspending the proposed tariff change. On September 13, 1967, the city of Colorado Springs filed a protest to the proposed tariff change requesting similar relief from the commission. On September 6, 1967, Pueblo T. V. Power, Inc., by and through its attorney, filed a letter of protest requesting a public hearing on the proposed tariff change. On September 21, 1967, Mountain States Video, Inc., filed a letter with the commission objecting to the proposed tariff change. On October 2, 1967, Colorado Community Television Association filed a letter with the commission objecting to the proposed tariff change. On October 6, 1967, Fred M. Betz, Jr., filed a letter with the commission objecting to the pro-

posed tariff change. On November 13, 1967, the city of Canon City filed a letter with the commission protesting the proposed tariff change. On November 22, 1967, Silver King Cable Corporation filed a pleading with the commission denominated as a complaint, and requesting generally the same relief sought in the complaint filed by the Colorado Municipal League.

On September 15, 1967, the Public Utilities Commission of the state of Colorado entered its Decision No. 70094, suspending the effective date of the proposed change in the tariff of The Mountain States Telephone and Telegraph Company, instituting the instant investigation into such proposed change, which investigation was docketed as "Investigation and Suspension Docket No. 595," and setting the matter for hearing in the hearing room of the commission, 532 State Services building, 1525 Sherman street, Denver, Colorado, at 10 A.M. on November 28, 1967.

After due and proper notice to all interested parties, the matter was heard by the commission at the designated time and place, the hearing being concluded on November 29, 1967.

Robert J. Pringle, the Colorado vice president and general manager of The Mountain States Telephone and Telegraph Company, testified as the sole witness for such respondent telephone company in support of the proposed tariff change. No exhibits were introduced in evidence by such respondent telephone company. Such respondent, however, did provide for the use of the commission, as well as all participants in the proceeding, a complete copy of the tariff under consideration in the instant proceeding. This tariff is entitled "Channel Service for Use in Community Antenna Television Systems Regulations and Schedule of Charges," and is designated as Colorado PUC No. 5. The commission now takes official notice of such tariff as originally issued on October 31, 1966, and all changes thereto,

and the secretary of the commission is directed to furnish copies thereof for the record in the event that an appeal is taken by any party in the proceeding.

The following witnesses were called by the protestants and testified:

Irving S. Hook, a certified public accountant, a lawyer, and a Councilman of the city of Denver; T. Eugene McCleary, Mayor of the city of Colorado Springs; Gordon D. Hinds, City Attorney for the city of Pueblo; Tom Coffey, City Manager of the city of Fort Collins; Bill Daniels, Director and Past President of the National Cable Television Association, President of Vumore Video (Colorado Springs), President of Pueblo Vumore, Greeley Video, Longmont Video, Fort Collins Video, and Loveland Video, and Chairman of the Board of Directors of Western Cable Television (Manitou Springs), testifying as a witness for Pueblo T. V. Power, Incorporated; Glenn R. Jones, President of Silver King Cable Company; Phil S. Tunks, President of Community Communications Company; a cable television operator with six (Boulder, Leadville, Salida, Monte Vista, and Delta) systems in Colorado, and a representative of the Colorado Community Television Association. Protestants identified and offered in evidence the following exhibits:

No. 1. A copy of Ordinance No. 343 of the city and county of Denver passed on October 16, 1967. Admitted

No. 2. A copy of Ordinance No. 3499 of the city of Colorado Springs passed on final reading on June 27, 1967. Admitted

No. 2-A. A copy of Vumore Video's cable television bid made to the city of Colorado Springs, dated August 1, 1967. Admitted

No. 2-B. Award of CATV permit under Ordinance No. 3499 made by the city of Colorado Springs to Vumore Video Corporation of Colorado, Inc. Admitted

No. 3. A copy of a cable television bid submitted to the city of Fort Collins, dated November 1, 1967. Not Admitted

No. 4. A copy of a 3-page letter, dated August 4, 1966, from Colorado Cablevision Corporation to the mayor and council of the city of Colorado Springs. Not Admitted

No. 5. A copy of letter (dated October 10, 1966) and an attached bid made by Southern Colorado Cablevision, Inc., to the Pueblo City Council. Not Admitted

No. 6. A copy of a "Trilateral CATV Pole Attachment Agreement." Admitted

No. 7. A publication of the Colorado Municipal League entitled "A Municipal Guide to CATV." Admitted

No. 8. A large diagram of a utility pole and attachments thereto. Withdrawn

Protestants' Exhibits No. 1, 2, 2-A, 2-B, 6, and 7 were admitted in evidence. Protestants' Exhibits No. 3, 4, and 5 were not admitted. Protestants' Exhibit No. 8 was not offered in evidence and was withdrawn.

Upon conclusion of the taking of testimony, the commission authorized all parties who might desire to so do, including the Colorado Community Television Association (as amicus curiae), to file briefs on or before January 15, 1968. The commission then took the matter under advisement. The transcript of testimony was filed with the commission

on December 27, 1967. The time for filing briefs has expired, and the matter is now before the commission for determination.

Findings of Fact

After due and careful consideration of the entire record in this proceeding, the commission finds as fact that:

1. The Mountain States Telephone and Telegraph Company, hereinafter referred to by full corporate name, as Mountain States Telephone, or as respondent, is a corporation duly organized and existing under the laws of the state of Colorado, with offices located at 930 Fifteenth street, Denver, Colorado. American Telephone and Telegraph Company, with offices at 195 Broadway, New York, New York, owns 86.75 per cent of the stock of The Mountain States Telephone and Telegraph Company. Mountain States Telephone operates as an interstate communications public utility in the state of Colorado under the jurisdiction of the Federal Communications Commission. Mountain States Telephone operates as an intrastate communications public utility in the state of Colorado under the jurisdiction of the Public Utilities Commission of the state of Colorado.

2. Television, as the term is generally used, is the electromagnetic transmission and virtually instantaneous reception of still or moving pictures with accompanying sound. Television signals can be so transmitted either by the use of radio waves or over wire (cable), or a combination of both. In so far as the general public is concerned, television service consists of various television broadcasting stations, which transmit programs that can be received on television receiving sets located within the range of the broadcasting station. The normal television receiving set is capable of receiving 12 channels (Channels 2 to 13, inclusive). The antenna utilized by these individual television receiving sets to pick up the broadcast television signal may range from

"rabbit ears" to relatively large antennas located on 50-foot, or higher, towers. In certain areas where reception is not good because of distance or topographical features, so-called "booster" or "translator" stations may be installed. A "booster" station has an antenna which picks up the signal of a specified broadcasting station, and a transmitter which rebroadcasts such signal on the same wave length or channel. A "translator" station performs the same function, but the rebroadcast is on a different wave length or channel. The effect of either a "translator" or a "booster" station is to permit a television broadcasting station to be received by television receiving sets located beyond the normal broadcasting range of the station. The television signal is still picked up by the antenna attached directly to the television set. These "booster" or "translator" stations are normally installed as community nonprofit projects in areas where the residents desire to obtain either additional or better television reception. The use of either "booster" or "translator" stations does not constitute community antenna television as such term will be used later in this order. Television broadcasting stations, as well as "booster" and "translator" stations, are subject to the regulatory jurisdiction of the Federal Communications Commission. The Colorado Public Utilities Commission has no regulatory jurisdiction over television.

3. The term "community antenna television," as used herein, and hereinafter sometimes referred to as CATV, involves the reception of television signals from several (one to 12) direct television broadcasting stations by use of a large master antenna, and the distribution of such television signals from such master antenna not by rebroadcast but by coaxial cable throughout a given geographic area. Such coaxial cable (as now in use) has a 12-channel capacity. Owners of television receiving sets in such area can then receive "community antenna television" by hooking into such coaxial cable system in the same way that they would receive

electric service or telephone service, namely, a service drop from the alley or street which would connect their television receiving set with the distribution cable. The television set owner then receives television signals by cable, rather than from his own antenna. We will hereafter refer to the master antenna and its attendant facilities as the "head-end" system; the cable and its attendant facilities as the "distribution" system; and all equipment used to connect the distribution system to the various individual television receiving sets as the "individual service" system. We will also refer to the point at which the television signals enter the distribution system from the "head-end" system as the in-put point, and the point where such signals leave the distribution system to enter the individual service system as the out-put point. Normally, there will be only one in-put point but there will be a separate out-put point for each television set owner receiving the service, just as there would be a separate out-put point for each electric customer.

4. Community antenna television has many advantages over normal television in so far as the ordinary television set owner is concerned. The two most important advantages are (1) that CATV provides consistently better television signals thereby providing a better picture on the screen of the television set owner, and (2) that normally CATV makes more channels available for the television set owner to watch. It would be technically possible for CATV to carry twelve separate direct television broadcasting stations. Because of the advantages of CATV, it is economically possible for complete CATV systems to be installed, and the public appears to be willing to pay sufficient monthly amounts for CATV service to make the operations of such CATV systems profitable. A person, firm, or corporation engaged in the business of providing CATV service will hereinafter be referred to as a CATV system operator. A television set owner who subscribes to the CATV service will hereinafter be referred to as a service subscriber. In the tariffs of Moun-

tain States Telephone hereinafter discussed, CATV system operators are referred to as "customers," and service subscribers are referred to as "patrons."

5. Mountain States Telephone does not provide CATV service. As a communication utility, however, it does hold itself out as ready, willing, and able to provide any CATV system operator with the necessary distribution service. In other words, Mountain States Telephone will accept the television signals from the "head-end" system of the CATV system operator at the in-put point, and over its own communication distribution (coaxial cable) system will deliver (for specified tariff charges) such television signals to the out-put points necessary for the CATV system operator to render CATV service to the service subscribers. This communications utility service is available to any and all CATV system operators that apply to Mountain States Telephone for such service. Mountain States Telephone has filed an interstate tariff covering channel service for use in community antenna television systems provided in the state of Colorado with the Federal Communications Commission. This interstate tariff is similar to Mountain States Telephone Colorado intrastate tariff (Colorado PUC No. 5). The interstate tariff is applicable to the distribution of all broadcast television signals received at the head-end system of the CATV system operator. *In other words, if a CATV system operator simply retransmits the broadcast television signals of direct broadcasting television stations, the distribution service rendered by Mountain States Telephone, even though performed solely in the state of Colorado, would be a purely interstate service, and not subject in any way to an intrastate tariff.*

6. The question now arises as to what channel service for use in community antenna television systems rendered by Mountain States Telephone in the state of Colorado is intrastate in character and subject to an intrastate tariff. As

we have hereinbefore stated, direct broadcast television stations are subject to the regulatory jurisdiction of the Federal Communications Commission. The Federal Communications Commission is also exercising regulatory jurisdiction to a limited degree over CATV system operators. Under applicable FCC regulations, a CATV system operator may not originate its own programs, except as to specified public interest television program material. Such locally originated public interest material is intrastate in character and when tendered to Mountain States Telephone for transmission over its distribution system is subject to a Colorado intrastate tariff. To provide for the rendition of this limited intrastate service, Mountain States Telephone filed with the Colorado Public Utilities Commission on October 31, 1966, to be effective December 1, 1966, its intrastate tariff (Colorado PUC No. 5) providing for the intrastate rendition of channel service for use in community antenna television systems. This tariff recognized the limited extent of intrastate service by providing in § II-D thereof:

"D. Use. Service is furnished to customers for the purpose of distributing locally originated public interest television program material such as weather information and locally originated news events and music programming by means of an intrastate closed circuit television network to the out-put points of all patrons of the customer as an incidental part of the customer's primary offering of interstate community antenna television service."

The CATV system operator has twelve channels available to render CATV service. Such operator might decide to use none of these channels for limited locally originated program material, in which case the interstate tariff would apply to his entire operation, or such operator might decide to use one or two of such channels for originating his own music programming, weather information, or news, in which case the intrastate tariff would apply to the use of these one

or two channels. *In either event, it is obvious that the primary service rendered by the CATV system operator will be interstate in character subject to interstate tariff, and the intrastate service rendered will be relatively minor, and in some cases nonexistent.*

7. On September 1, 1967, Mountain States Telephone filed with the commission its Advice Letter No. 435 with proposed tariff page changes attached proposing to change its intrastate *channel service for use in community antenna television systems tariff* (Colorado PUC No. 5) by deleting therefrom subsection F, § II, found on page 6 of said tariff, which reads:

"F. Obligation of Customer (CATV System Operator). The customer (CATV system operator) shall be responsible for obtaining any authority to provide CATV service to its patrons (service subscribers) that may be required by law or local ordinance." (Parenthetical material inserted by commission.)

This proposed deletion was to have become effective on statutory notice on October 1, 1967, but the commission in Decision No. 70094 entered September 15, 1967, suspended the effective date of such proposed deletion, instituted the instant investigatory proceeding, and conducted a hearing relative to such proposed deletion. The precise question before the commission in this proceeding is whether or not Mountain States Telephone should be permitted to delete the above-set-forth subsection F from the said tariff. The Federal Communications Commission has already permitted Mountain States Telephone to delete such paragraph from its interstate tariff.

8. In said Advice Letter No. 435, Mountain States Telephone stated the reason for such deletion to be:

"Since the fact that whether or not a CATV company has complied with local ordinances and has subsequently

been granted permission to provide CATV service is a matter of public notice, such a regulation is redundant."

We agree with the determination that subsection F is redundant, but not with the reasoning advanced in support of such determination. Subsection F is simply a particularized restatement of the general law that it is the responsibility of all persons to comply with applicable law. The responsibility of a CATV system operator to comply with applicable law cannot be altered or changed in any way by a regulation in the tariff of a public utility. Subsection F is therefore redundant, as the responsibility of a CATV system operator to comply with applicable law remains the same whether subsection F is in the tariff or not. It is not the obligation or responsibility of Mountain States Telephone to see that a CATV system operator complies with applicable law. This is the normal function of law enforcement agencies. For example, it is neither the function nor responsibility of a motor vehicle common carrier delivering goods to a retail merchant to determine whether or not such merchant is properly licensed by municipal and state authorities. If subsection F should be erroneously and improperly interpreted in such manner as to require Mountain States Telephone to assume the responsibility for determining, interpreting, and enforcing applicable law, then such subsection F would not only be ambiguous, but would also be an improper tariff provision. Order provisions to follow will authorize the deletion of said subsection F from Mountain States Telephone tariff Colorado PUC No. 5, and the tariff as so amended will be just, reasonable, and nondiscriminatory.

Discussion

[1] In view of the great interest evidenced in this proposed tariff change by the municipalities of the state of Colorado, as well as CATV system operators, the commission deems it proper to discuss in somewhat more detail cer-

tain of the problems involved in the rendition of CATV service, even though such problems are not particularly relevant as to our decision in the instant proceeding.

At the outset, CATV system operators have a major problem in that such operators, in effect, are reselling the product of the direct television broadcasting stations. Much of the material broadcasted by such direct television broadcasting stations is copyrighted. It is an interesting legal question as to whether CATV system operators are violating the copyright laws by the redistribution for profit of copyrighted direct television broadcasting material without the permission of the copyright owner. Cases raising this issue are now pending before the Supreme Court of the United States, with oral arguments probably to take place in March or April of this year. Such problem has also been brought to the attention of the Congress of the United States, and it is possible that Congress may consider the enactment of legislation concerning such issue. Of course, the issue of such potential liability is primarily a problem of the CATV system operator. We point out, however, that if the controversial subsection F should be improperly interpreted to require Mountain States Telephone to assume the responsibility for determining, interpreting, and enforcing a local municipal ordinance relating to CATV service, such subsection F could logically also be misinterpreted to require Mountain States Telephone to assume the responsibility for determining, interpreting, and enforcing the copyright laws. Again this is the responsibility and function of our law enforcement agencies. To draw a further parallel, it is not the function or responsibility of a motor vehicle common carrier to determine the legal ownership of goods tendered to it for transportation.

[2-4] We turn now to the problems of a new potential CATV system operator. Assume with us that this operator has made the necessary studies and has determined that it

will be financially profitable to render CATV service to the inhabitants of anytown in the state of Colorado. Such operator has determined where his master antenna system will be located, and is now considering how to provide the necessary coaxial cable distribution system. He has three choices available to him, i. e.: (1) He may construct his own distribution system, either installing the coaxial cable underground, or attaching the coaxial cable to an aboveground pole system which he would construct; (2) he may enter into a pole attachment agreement with existing public utilities rendering utility service in anytown, pay rental to such public utilities for the use of the existing utility pole system, and attach his coaxial cable distribution system to such existing utility pole system; (3) he may use the channel service for use in community antenna television systems provided as a public utility service by Mountain States Telephone under its applicable tariffs, interstate and intrastate (Colorado PUC No. 5).

All three of these choices involve the use of the streets, alleys, and perhaps utility easements of anytown. Therefore, if the CATV system operator elects to proceed under either Option 1 or Option 2, such operator must obtain permission from anytown to use its streets, alleys, and utility easements to install therein or thereon the required coaxial cable distribution system. A legal question probably exists as to whether the permission granted by anytown should be in the form of a franchise or a license-permit. If a franchise is required, then if anytown is a home-rule city, the question may have to be submitted to a vote of the people. In either event the amount of the franchise tax or license-permit fee must be determined, apparently normally by negotiations with the officials of anytown. A further problem exists as to Option No. 2, in that in addition to obtaining permission from anytown to use its streets, alleys, and utility easements, the CATV system operator must negotiate a pole attachment agreement with existing public utilities which would

permit the said operator to attach his coaxial cable to the existing utility pole system. The Colorado Public Utilities Commission has not, in the past, considered pole attachment agreements to be a utility service. Therefore, existing public utilities are free to enter into such agreement, or not, as they may elect. Option No. 3 would involve the use of Mountain States Telephone's channel service. For reasons that were not made completely clear in the instant proceeding, CATV system operators apparently do not desire to utilize such service of Mountain States Telephone. One of such operators testified that the service rendered by Mountain States Telephone was not as good as it should be, and the tariff charges were too high. In passing, we point out that the Colorado Public Utilities Commission, on complaint filed, has full jurisdiction to investigate the matter of service and rates, and take the necessary action to insure the rendition of proper service at just and reasonable rates. It would appear that if Option No. 3 were utilized by a CATV system operator, it would not be necessary to obtain permission from anytown to use its streets, alleys, and utility easements, as Mountain States Telephone, in the rendition of service as a communications public utility, already has authority to use such streets, alleys, and public utility easements.

It is interesting to note the position of the three CATV system operators who testified before the commission in the instant proceeding. None of them wanted to use the public utility service offered by Mountain States Telephone to CATV system operators. In effect, they simply wished to prevent any other CATV system operator from utilizing such service and entering into competition with existing CATV system operators. Apparently such operators desire to have the same territorial protection afforded to fixed public utilities without the accompanying public regulation of rates and service. The commission, although recognizing the force of such economic motivation, entertains little sympathy for the position of its industry advocates.

[5] The position of the municipalities of the state of Colorado is somewhat different — although such position is also based on an economic motivation. The municipalities of the state of Colorado appear to be faced with the problem of increased public demands for municipal services, both from a quantity and quality standpoint. Such demands can be met only by increased revenues. The primary sources for tax revenues are (1) property tax, (2) sales tax, (3) income tax, and (4) miscellaneous (sometimes referred to as nuisance) taxes. Many municipalities already have a relatively high property tax as well as a relatively high sales tax. Municipalities are not, under existing law, authorized to impose an income tax. As a result, municipalities in the state of Colorado have not only been raising their miscellaneous taxes in many areas, but have also been looking for new areas in which to levy taxes. With the advent of CATV, Colorado municipalities apparently recognized an opportunity to increase municipal revenues by levying a franchise tax or a permit license fee upon CATV system operators rendering CATV service within the corporate limits of their respective municipalities. Such a tax would in effect be a luxury tax, as free television would remain available to all television set owners who did not subscribe to the CATV service. The amount of the tax revenues payable to the municipality could be maximized by permitting only one CATV system operator to render service within the corporate limits of the municipality, and by allowing potential operators to bid against each other for the necessary municipal permission to render such service. The bidding, in effect, would relate to the amount of tax each CATV system operator would be willing to pay to the city for the privilege of rendering CATV service under a specified schedule of rates. The municipalities, of course, could, as a practical matter, control the rendition of CATV service under Options 1 or 2, because of their control over municipal streets, alleys, and utility easements. The municipalities, however, would have

little or no control over service rendered under Option No. 3. In other words, an unsuccessful CATV system operator bidder might still be able to render CATV service in the city under Option No. 3, and his ability to so do would effectively negate the attempt of the municipality to allow such service to be rendered only by the highest bidder. In the present proceeding, the municipalities, in effect, are requesting the Colorado Public Utilities Commission to exercise its regulatory authority to preclude Mountain States Telephone from rendering service to a CATV system operator under Option 3, unless such operator first obtains a franchise or license-permit from the municipality. Even though we are fully aware of the revenue problems of the municipalities of the state of Colorado, and sympathize with the municipal officials who are responsible for solving such problems, we would deem it a misuse of the regulatory authority conferred upon us by the Constitution of the state of Colorado and the General Assembly of the state of Colorado to so do. However, even if we were inclined to use the regulatory power of the commission for such purpose, any attempt on our part to so do would be relatively ineffectual, as the primary service rendered by a CATV system operator is interstate in character and rendered under an interstate tariff, not an intrastate tariff.

We turn now to discuss the position of Mountain States Telephone in the instant proceeding. This company is a public utility. It has a legal obligation to render service under its tariffs on file with the Colorado Public Utilities Commission. If such company improperly refuses to provide such service, it may be liable in damages. Under the existing tariff provision, i.e., subsection F, if Mountain States Telephone refused to render service under its channel tariff (Colorado PUC No. 5) because the CATV system operator did not have authority from the municipality, and it were later judicially determined that such authority was either

not necessary or improperly withheld by the municipality, there would then be a possibility that Mountain States Telephone would be liable in damages to said CATV system operator. Mountain States Telephone wishes to obviate such possibility by eliminating such provision from its tariff. Mountain States Telephone would then render service under such tariff to all service applicants. If the municipality were of the opinion that the CATV system operator in rendering CATV service was in violation of any municipal ordinance, it would then be incumbent upon the municipality to enforce such ordinance against the CATV system operator in the appropriate judicial forum. We see nothing wrong with such procedure. The judicial system of the state of Colorado is the proper forum to adjudicate such issues, not the Colorado Public Utilities Commission. Furthermore, we point out that in the long run all costs of doing business incurred by a public utility eventually are paid by the ratepayers of such utility as part of the rates charged by the utility. We see no reason for the telephone ratepayers in the state of Colorado to assume any potential liability by our requiring said subsection F to remain in the tariff of Mountain States Telephone.

The CATV system operators now rendering CATV service in the state of Colorado appear to have convinced the municipalities that CATV service should be monopolistic in nature. The argument advanced seems to be that a CATV system has basically the same characteristics as, for example, an electric system. In other words, it is necessary in order to provide CATV service to construct a system at great cost, and therefore a duplicating system would constitute considerable economic waste. On the surface, this argument appears to be tenable. We have grave doubts, however, as to whether the actual facts would support the theory. We have seen no figures comparing the fixed system cost per service subscriber of a CATV system with the fixed system

rough comparison of the necessary equipment, however, cost per customer of an electric, gas, or telephone utility. A would indicate to us that the fixed system cost per potential service subscriber of a CATV system would be far below the fixed system cost per customer of a gas, electric, or telephone utility. A further fact to be considered is that the product distributed by the CATV system operator is obtained by such operator at little or no cost, whereas natural gas or electric energy must be purchased or generated by the gas or electric utility. We readily admit that we have not performed the necessary cost studies to determine whether in truth or in fact the investment per service subscriber necessary on the part of a CATV system operator to render CATV service is so great as to economically justify the creation of a monopolistic system of distribution. On the incomplete facts known to us, we doubt it.

It would appear that the state of Colorado has two avenues open to it concerning the treatment of CATV service: The first avenue would be to simply treat the rendition of CATV service in the same manner as any other legitimate business enterprise. A municipality, of course, has the right to require any business enterprise to obtain a license. Such licenses normally issue as a matter of course upon payment of the required fee and compliance with routine conditions set forth in the applicable municipal ordinance, i.e., retail store licenses. The CATV system operator could then elect to proceed to construct the necessary system. If he elected to proceed under Options 1 or 2, he would have to arrange with the municipality to use its streets, alleys, and utility easements. If he elected to proceed under Option 3, he would obtain channel service from Mountain States Telephone. He would be competing with free television from direct television broadcasting stations. He would also be competing with any other CATV system operators who might elect to render service in the same geographical area.

The license issued to him by the municipality would be non-exclusive, and a similar license could be procured by any other qualified license applicant. The public would be protected from the payment of exorbitant rates, not only by the competition of free television, but also by the actual or potential competition of other CATV systems operators.

The other alternative would be to treat the rendition of CATV service in generally the same manner as a monopolistic fixed utility service. In this event, the CATV system operator would have a protected geographical area in which to render service. No other CATV system operator would be permitted to render CATV service in such area. It is obvious that this alternative implies and is conditioned upon the utilization of governmental power, state or municipal, to preclude the entry of competitors into the field. It should also be obvious that governmental power should not be utilized to confer a monopoly status on any business, unless at the same time such governmental power is utilized to control and regulate the rates, services, and rate of return of such business. Under existing law, it appears that the Colorado Public Utilities Commission has no jurisdiction to regulate in any way the rendition of CATV service by a CATV system operator. The Federal Communications Commission has disclaimed any intent to attempt to so regulate the rates charged or the service rendered by a CATV system operator, stating that such jurisdiction is, in effect, a function for local (state or municipal) government. It is extremely doubtful if the municipalities of the state of Colorado have such jurisdiction, despite their efforts to achieve some sort of rate regulation by, in effect, conditioning revocable licenses to utilize streets, alleys, and utility easements upon the retention of certain specified rate schedules. It seems clear that if the rendition of CATV services is to be treated as the rendition of a public utility service, then the legislature of the state of Colorado should be requested to pass the

required legislation placing the rendition of such service under proper regulation. We note that the Colorado Public Utilities Commission has not sought such jurisdiction. However, we would be most happy to co-operate with the municipalities of the state of Colorado in working out possible solutions to the problems, and submitting such possible solutions to the legislature for the consideration of such body.

ORDER

The commission *orders:* That the proposed change in the Mountain States Telephone and Telegraph Company Colorado PUC Tariff No. 5, channel service for use in community antenna television systems (CATV), by the deletion from its existing tariff of subsection F, § II, which reads:

"F. *Obligation of Customer*

The customer shall be responsible for obtaining any authority to provide CATV service to its patrons that may be required by law or local ordinance," should be, and hereby is, permitted to become effective as set forth herein.

That the effective date of First Revised Sheet No. 6, channel service for use in community antenna television (CATV) systems tariff (Colo PUC No. 5), shall be the effective date of the order herein. That this order shall become effective twenty-one days from date hereof, and as of such date, the suspension of said tariff shall be, and hereby is, lifted, and Investigation and Suspension Docket No. 595 shall be closed.

ZARLENGO, Chairman, concurring: I concur in the order in toto.

The issue before the commission is: Should the commission authorize and order deletion of that part of the telephone company's filed tariff, to wit:

"F. *Obligation of Customer*

The customer shall be responsible for obtaining any authority to provide CATV service to its patrons that may be required by law or local ordinance."

Many contentions and arguments have been voiced for and against retention of such provision.

The provision could be construed to be a notice and statement of the company's position as to *whose* is the responsibility for obtaining authority required by law or local ordinance, if any, for a CATV operator to render service to patrons. It is an attempt to make it clear that it is the *customer's* (the CATV operator) responsibility to obtain proper local authorization to render CATV service and that it is not the *company's* responsibility. As such it constitutes an effort at clarification of responsibility to avoid misunderstanding and, as such, while it may be useful it is not a necessary part of the tariff.

If the provision is construed to be the imposition of a condition precedent to rendering service to the CATV operator that the CATV operator must first obtain any authority which may be required by law or local ordinance to render CATV service to its patrons it is illegal. The company, as a public utility, must serve, and it cannot within the framework and purview of the laws relating to regulation of public utilities, refuse its service upon such grounds. It does not have powers to enforce local law or ordinances, nor can it arrogate unto itself such powers by filing a tariff and by exercise of the coercive action of withholding its public utility services. The matter of compliance with local law and ordinance is a matter resting between the CATV operator and the local authorities. The local authorities may seek by law to impose such a right and duty upon the company. However, as to the legality of such law no opinion is hereby ventured.

The commission is not called upon to determine whether or not it has jurisdiction over the rendering of CATV service. The commission is not called upon to determine whether or not the referred-to pole attachment service is subject to its jurisdiction. Therefore, no opinion is hereby given as to such questions.

LIST OF PETITIONER'S AFFILIATED COMPANIES

As of December 12, 1980

Name	Jurisdiction and Date Of Incorporation	Jurisdiction In Which Qualified As A Foreign Corporation	Percentage Of Stock Ownership By Parent Company And Subsidiaries
	RESTRICTED SUBSIDIARIES		
I. TELE-COMMUNICATIONS, INC.	Delaware 8/20/68	Colorado, Utah	The Company
A. CENTRE VIDEO CORPORATION	Pennsylvania 4/14/52		100%
1. Allegheny Cablevision, Inc.	Pennsylvania 2/11/65		60%
2. Centre Video Corporation of Ohio, Inc.	Ohio 2/9/39		100%
3. Centre Video Corporation of West Virginia	West Virginia 10/8/64		100%
B. COMMUNITY TELE-COMMUNICATIONS, INC.	Nevada 1/13/64	Colorado, Idaho, Iowa, Kentucky, Montana, Nebraska, New Mexico, Ohio, So. Dakota, Tennessee, Texas, Utah, Wyoming, Oklahoma, Kansas, Missouri	100%
1. Alabama T.V. Cable, Inc.	Alabama 11/12/64		80%
a. Microwave Services, Inc.	Alabama 12/18/72		50%**
2. Cable T.V. of Durango, Inc.	Nevada 12/10/65	Colorado	100%
3. Centennial Communications Corporation	Delaware 8/22/77	Indiana	100%

4. Columbus Cablevision, Inc.	Georgia 1/14/65		100%
5. Community Communications Company	Colorado 5/19/66		100%
6. Community Realty, Inc.	Nevada 6/27/67	Arizona, California, Montana, Nebraska, Utah, Wyoming	100%
7. Community TCI of Colorado, Inc.	Colorado 4/11/74		100%
8. Community TCI of Kansas, Inc.	Kansas 4/17/67		100%
9. Community TCI of Ohio, Inc.	New Jersey 2/9/39	Ohio, West Virginia	100%
a. C & R Cable System, Inc.	Ohio		100%*
b. J.A.V. Enterprises, Inc.	Ohio		100%
c. Miami Valley Cable, Inc.	Ohio 8/31/73		100%
d. New Castle Cable Communications, Inc.	Indiana 12/17/70		80%
e. Wheeling Antenna Company, Inc.	West Virginia	Ohio	100%*
i. Brooke Cable Co.	West Virginia		100%*
ii. Wellsburg Cable Co.	West Virginia		100%*
10. Community Television of Utah, Inc.	Nevada 2/7/66	Utah	100%
11. Com-West, Inc.	Delaware 11/15/71	Oklahoma, Minnesota	100%
a. Cable View of Albert Lea, Inc.	Minnesota 11/15/71		80%
b. Cablevision of Austin	A Minnesota Joint Venture		80%

Name	Jurisdiction and Date Of Incorporation	Jurisdiction In Which Qualified As A Foreign Corporation	Percentage Of Stock Ownership By Parent Company And Subsidiaries
12. CTCI Cablevision, Inc.	Delaware 11/19/68	California	100%
a. Peninsula T.V. Power, Inc.	California 8/2/68		100%
b. Poughkeepsie Cablevision, Inc.	New York 12/6/67		100%
c. Pueblo T.V. Power, Inc.	Colorado 9/1/66		100%
d. T.V. Power of North County, Inc.	California 2/9/68		100%
13. Dodge City CATV, Inc.	Kansas 1/30/67		100%
14. Fredonia Cable TV, Inc.	Kansas 2/28/68		100%
15. Fulton Community Antenna Television Systems, Inc.	Illinois 10/26/71		80%
16. Kauai Cablevision, Inc.	Hawaii 7/25/80		100%
17. Nation Wide Cablevision, Inc.	Delaware 12/16/68		100%
a. Nation Wide Cablevision, Inc.	California 2/15/66	Washington	100%
i. Peninsula Cable Television Corporation of Menlo Park	California 4/14/69		100%
iii. Port Arthur Cablevision, Inc.	Texas 2/3/69		100%
18. Richland Cable Systems, Inc.	Wisconsin 9/6/78		100%

19. Sierra Communication Systems, Inc.	California		80%
20. TCI Cablevision, Inc	Nevada 10/31/77	Colorado, Florida, Missouri, South Carolina	100%
21. TCI Pacifica Corp.	Delaware 7/28/72	California	100%
a. Brisbane Cable T.V., Inc.	California 8/11/69		84%
b. Crystal-Brite Television, Inc.	California 12/5/66		80%
c. Fremont Cable T.V., Inc.	California 12/5/66		90%
d. Vista Grande Cablevision, Inc.	California 7/17/68		84%
22. TV Pix, Inc.	Nevada 4/16/56	California	100%
23. Twenty CATV, Inc.	Georgia 10/8/69		87%
24. Utah Satellite Company	Delaware	Utah	100%
C. WESTERN TELE-COMMUNICATIONS, INC.	Nevada 9/13/65	Arizona, California, Colorado, Idaho, Montana, North Dakota, Oregon, Tennessee, Utah, Washington, Wyoming, Nebraska, Kansas, South Dakota, New Mexico	100%
1. American Television Relay, Inc.	Arizona 10/14/54	California, New Mexico, Texas	100%
2. General Communication, Inc.	Alaska 5/16/79		100%*
3. Western Satellite, Inc.	Nevada 11/30/79	Arizona, Colorado, Idaho, Kansas, Montana, Nebraska, New Mexico, North Dakota, South Dakota, Oregon, Utah, Washington, Wyoming	100%

Name	Jurisdiction and Date Of Incorporation	Jurisdiction In Which Qualified As A Foreign Corporation	Percentage Of Stock Ownership By Parent Company And Subsidiaries
	UNRESTRICTED SUBSIDIARIES		
D. TCI DEVELOPMENT CORPORATION	Colorado 11/28/69	Arkansas, Georgia	100%
1. All Channel T.V., Inc.	Wisconsin 9/10/65		33⅓%**
a. Complete Channel T.V., Inc.	Wisconsin 9/3/65		100%
2. Brookside Antenna Company, Inc.	Ohio		100%
3. Columbia Communications Associates	A Texas Joint Venture		50%**
4. Community Cable of Louisiana, Inc.	Louisiana 5/19/80		100%
a. New Orleans Tele-Communications	Louisiana Joint Venture		50%**
5. Community Tele-Communications of South Dakota, Inc.	Colorado 7/29/77	South Dakota	100%
a. Sioux Falls Cable Television	A South Dakota Partnership		80%**
6. Cornhusker Cablevision, Inc.	Nebraska 5/5/80		100%
7. Hillcrest Cablevision, Inc.	Ohio 7/27/79		50%**
8. Home Theatres, Inc.	Arkansas		3.62%**
9. Memphis CATV, Inc.	Tennessee 12/30/65		44.5%**

10.	Peninsula Cable Television Corporation of San Mateo	California 8/29/69		86%
11.	Springfield Tele-Communications Company, Inc.	Colorado 5/28/80	Massachusetts	100%
12.	TCI Colorado Corporation	Colorado 3/7/80		100%
13.	TCID of Texas, Inc.	Texas 12/29/79		100%
14.	Tele-Matrix Corporation	Nevada 11/13/79		50%**
15.	TCI Programs, Inc.	Delaware 5/22/70	Colorado	100%
	a. Black Entertainment Television, Inc.	Dist. of Columbia	..	10%**
	b. Cable Network Television, Inc.	Nevada 7/1/65	Colorado	100%
	c. National Telefilm Associates, Inc.	New York 8/21/52	California	77.46%
	d. TCI Cable Theatre, Inc.	Nebraska 9/4/73	Ohio	100%
16.	Tri-State Cablevision, Inc.	Ohio 11/27/78		100%
17.	Vail Cable Communications, Inc.	Colorado		15%**

Name	Jurisdiction and Date Of Incorporation	Jurisdiction In Which Qualified As A Foreign Corporation	Percentage Of Stock Ownership By Parent Company And Subsidiaries
E. TCID 2, INC.	Nevada 11/28/80		100%
1. Athena Communications Corporation	Delaware 12/28/78	New York, Mississippi, Colorado	74.2%
a. Athena Cablevision Corporation	Delaware 12/28/71	Colorado, California, Florida	100%
i. Athena Cablevision of Tennessee and Kentucky, Inc.	Tennessee 9/28/79	Indiana, Kentucky	100%
a. Tennessee and Kentucky Cable TV Company	A Tennessee Partnership 9/28/79		50%
a.i. Blount County Cable TV Company LTD.	A Tennessee Limited Partnership		50%
ii. Celebration Cablevision Corporation	Tennessee 3/16/77		100%
iii. Halifax Cable TV, Inc.	Florida 1/14/64		99%
a. Halifax Cablevision, Inc.	Florida 8/5/63		100%
a.i. Volusia Cable-Vision Corp.	Florida 10/11/63		100%

b. Athena Development Corporation	Delaware 7/17/73	100%
i. Athena Cablevision of Corpus Christi, Inc.	Texas 2/26/73	100%
ii. Athena Cablevision Corporation of Knoxville	Tennessee 4/11/74	100%
iii. International Telemeter Corporation	New York 7/21/64	100%
iv. Schenectady Cablevision, Inc.	New York 10/22/77	87%
c. Black Entertainment Television, Inc.	District of Columbia	10%**
d. Texcom, Inc.	Texas 4/17/79	99%
e. Torrence Communications, Inc.	Mississippi 1/10/80	80%
i. Rankin County Cablevision Company	Mississippi 8/3/76	100%

Name	Jurisdiction and Date Of Incorporation	Jurisdiction In Which Qualified As A Foreign Corporation	Percentage Of Stock Ownership By Parent Company And Subsidiaries
F. TCID 3, INC.	Nevada		100%
1. Tele-Communications Investments, Inc.	Colorado 11/29/76	Illinois, New Jersey, North Carolina	50%**
a. Cable Communications Equities, Inc.	Nevada 5/14/80	South Dakota, Minnesota, Washington	100%
b. Cable Investments, Inc.	Delaware 10/1/64		100%
i. Cable T.V. of Minot, Inc.	North Dakota 5/14/71		100%
a. Minot Cable Systems	A North Dakota Partnership		2%**
ii. Brazoria Cablevision, Inc.	Texas 12/18/70		100%
a. Brazoria Cablevision Associates	A Texas Partnership		100%
b. Standard Communications Associates, Inc.	Delaware 8/23/72	Texas	100%
iii. CATV of Elizabeth, Inc.	New Jersey 5/3/68		80%
iv. G-F Cable T.V., Inc.	North Dakota 3/24/65	Minnesota	100%
v. Glendive Cable T.V., Inc.	Montana 4/1/65		50%**
vi. Keystone Communicable, Inc.	Pennsylvania 6/6/75		100%

vii. Madison Communications, Inc.	Delaware 3/8/74		100%
a. Island Cable Company	New Jersey 9/22/75		100%
b. Madison Cablevision, Inc.	Delaware 7/24/74	Maryland, North Carolina, South Carolina, Virginia, Vermont	100%
c. St. Albans Cablevision, Inc.	Delaware 8/6/74		100%
viii. Minot Cable System	A North Dakota Partnership		98%
ix. Satellite Services, Inc.	Delaware 8/16/77		100%
x. Upper Valley Telecable Company, Inc.	Idaho 10/31/78		25%**
c. Communications Investments, Inc.	Colorado 12/26/78		100%
d. Creative Films, Inc.	Colorado 2/1/80		100%
e. Mahoning Valley Cablevision, Inc.	Ohio 9/19/80		100%

Name	Jurisdiction Of Incorporation	Jurisdiction In Which Qualified As A Foreign Corporation	Percentage Of Stock Ownership By Parent Company And Subsidiaries
	MANAGED COMPANIES		
I. Crest Communications, Inc.	Kansas 3/15/77		***
1. Cape Girardeau Cable TV	A Missouri Partnership		
2. Jackson Cable TV	A Missouri Partnership		
3. Newton Cable TV, Inc.	Kansas 4/21/76		100%
4. Satellite Communications Services, Inc.	Kansas 1/25/77		100%
II. Burke County Cable Television, Inc.	Georgia		***
III. Saline County Cable Television, Inc.	Arkansas		***

*An Unrestricted Subsidiary — stock held by a Restricted Subsidiary for investment purposes only.

**For informational purposes only, not a subsidiary as defined by majority ownership.

***Not an affiliated corporation, CATV systems subject to Management Agreement.

Office-Supreme Court, U.S.
FILED
MAY 22 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1350

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

COMMUNITY COMMUNICATIONS COMPANY, INC.
Petitioner,

v.

CITY OF BOULDER, COLORADO, et al.,
Respondents.

JOINT APPENDIX

PETITION FOR CERTIORARI FILED FEBRUARY 9, 1981

CERTIORARI GRANTED APRIL 6, 1981

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Date	Proceedings
1/15/80	Complaint filed.
2/22/80	HEARING ON TRO . . . Ordered: Plaintiff's motion for TRO denied. There is no demonstration of irrevocable injury. Case to be addressed on a motion for preliminary injunction to be heard on 3/4/80.
	MOTION by Plaintiff for Temporary Restraining Order.
	Memorandum in support of Motion for Temporary Restraining Order.
2/25/80	MOTION TO DISMISS filed by Defendants Boulder Communications Company, Thomas Cross, Jack Kerner, Michael Thompson, Donald Passalacqua, Barry Telleen and Dennis DuBé.
3/ 3/80	Motion to Dismiss filed by City of Boulder.
3/ 4/80	HEARING ON Motion for Preliminary Injunction . . . ORDERED Petition of the Colorado Attorney General for leave to file Memorandum as Amicus Curial Denied on limited Grounds of not being in proper jurisdiction of the Amicus Curial role. Motions to dismiss by defendants & deferred ruling until evidence of preliminary injunction has been considered.
	City of Boulder's Brief in Opposition to Plaintiff's. Motion for Preliminary Injunction.
3/ 5/80	HEARING ON Motion for preliminary injunction (Second Day).
3/ 6/80	HEARING ON MOTION FOR PRELIMINARY INJUNCTION . . . (Third day . .) ORDERED: Any offers or objection to deposition testimony shall be submitted in writing after the conclusion of the trial . . . ORDERED: Counsel to file any additional evidence by or on March 10, 1980, at 5 P.M. Any additional authorities should also be submitted by or on March 10, 1980.
	Plaintiff's Supplemental Memorandum in support of Motion for Preliminary injunction.

Date	Proceedings
3/17/80	HEARING ON RULING. Memorandum Opinion and order hand delivered to Counsel. ORDERED: Motion for Preliminary Injunction. . . —granted.
3/27/80	NOTICE OF APPEAL, filed by Defendants, re Order of 3/17/80.
4/ 1/80	Appellant's motion for expedited consideration on the merits filed.
	Brief of appellant in support of motion for expedited hearing filed.
4/ 4/80	Granted appellant's motion for expedited consideration on the merits; disposed of by McWilliams, Breitenstein, Doyle.
4/10/80	Appellant's docketing statement filed.
4/17/80	Record on appeal filed—Volumes I, II, III (pleadings) (957 pg Volumes IV-IX (transcript); Volumes X-XVI (depositions); Volume XVII (exhibits) original record.
4/18/80	Appellee's response to motion of Attorney General, State of Colorado, to file brief and participate in oral argument as amicus curiae filed; Attorney General, State of Colorado, to file brief and participate in oral argument as amicus curiae submitted to panel.
4/21/80	Appellee's motion for reconsideration of order expediting appeal filed.
4/23/80	Appellee's motion to strike appellants' docketing statement denied—Seth.
	Order: State of Colorado is granted leave to become an amicus curiae in this appeal—Seth.
	Order: State of Colorado's motion to participate in oral argument is denied—Seth.
4/23/80	Appellant's response to appellee's motion for reconsideration of order entered April 4, expediting this appeal filed.
4/29/80	Denied appellee's motion for reconsideration of order expediting appeal disposed of by Seth.
5/ 8/80	Case argued and submitted—Seth, Seymour, Markey.

Date	Proceedings
5/ 9/80	On Court's own motion, appellee enjoined from proceeding with construction of new cable TV installations in Boulder—Seth, Seymour, Markey.
5/15/80	Appellee's motion for reconsideration filed.
5/19/80	Appellant's opposition to TCI's motion for reconsideration filed.
5/28/80	Published signed opinion filed—Seth, Seymour, Markey. Writing Judge is Seth.
	Judgment reversed and remanded.
5/28/80	Appellee's reply to City's opposition to appellee's motion for reconsideration of 5/9/80 interim order filed.
6/25/80	Appellee's petition for rehearing en banc filed.
	Amicus curiae memorandum in support of appellee's petition for rehearing filed.
7/ 1/80	Published dissenting opinion filed. Writing judge is Markey.
7/22/80	On the Court's own motion, parties granted to 8/5/80 to file supplemental memoranda relating to rehearing or suggestion for rehearing en banc—Seth, Seymour, Markey.
8/ 5/80	Appellant's memorandum with respect to Markey's dissenting opinion filed.
	Supplemental memorandum of amicus curiae in support of appellee's petition for rehearing en banc filed.
	Appellee's memorandum in support of petition for rehearing en banc filed.
8/ 7/80	Record on Appeal Supplement, Vol. I, Exhibits, org.
10/ 1/80	Order denying appellee's petition for rehearing & suggestion for rehearing en banc. Seth, Seymour, Markey.
10/ 9/80	Mandate issued to District Court.
2/14/81	Appellee's petition for writ of cert filed 2/9/81. Supreme Court No. 80-1350.
4/10/81	Supreme Court order granting appellee's petition for writ of cert on 4/6/81.

ORDINANCE NO. 2846

AN ORDINANCE GRANTING A REVOCABLE PERMIT OF THE CITY OF BOULDER, TO COLORADO TELEVENTS, INC., A COLORADO CORPORATION, TO CONDUCT THE BUSINESS OF A COMMUNITY ANTENNA TELEVISION SYSTEM IN THE CITY OF BOULDER, FOR A PERIOD OF TWENTY YEARS; AND SETTING FORTH DETAILS IN RELATION THERETO.

WHEREAS, Colorado Televents, Inc., a Colorado corporation, with offices at 270 Columbine Street, Denver, Colorado, has made application to the City Council of the City of Boulder for a permit to conduct the business of a community antenna television system in said City of Boulder through the media of transmission by cables, and/or wires, or otherwise, commonly known as a Master Antenna Cable System, and;

WHEREAS, said cable system would be attached to poles whereby said cables, wires, and related appurtenances would cross over the streets, alleys, sidewalks, highways and other public ways and places of the said City of Boulder, and;

WHEREAS, the City Council is of the opinion that the operation of a community antenna television system is necessary so that those persons who are situated in the City so as not to get adequate television reception may receive the same, and;

WHEREAS, the City Council is of the opinion that the best and most practical method of providing said services is by granting to a private person or company, revocable authority and permission to operate such approved system upon terms and conditions prescribed and acceptable to the City.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF BOULDER, COLORADO.

Section 1. That there is hereby granted unto Colorado Televents, Inc., its successors and assigns, hereinafter referred to as the grantee, the right, permit and privilege, for a period of twenty (20) years from date of final adoption of this ordinance, to conduct the business of a Community

Antenna Television System in said City of Boulder; and to erect, construct, operate and maintain on, under and above the present and future streets, alleys, highways and other public ways and places of the City of Boulder, such poles, lines, cables, wiring and related appurtenances as are necessary for the purpose of originating, receiving, amplifying and distributing television and radio signals to the inhabitants of the City of Boulder; save and except that the aforesaid rights and privileges shall be subject to the conditions, exceptions and limitations herein contained.

Section 2. That the right, permit and privilege herein granted is subject to revocation by the City Council, at its pleasure, at any time. In the event of revocation, termination or expiration of this permit the grantee shall at its own expense remove any poles, wires, cables and related appurtenances that shall have been erected and shall leave the streets, alleys, and public ways and places in as good condition as they were prior to said installation. To this end the grantee shall post a performance bond, as provided in Section 10 hereof.

Section 3. The right to use and occupy said streets, alleys and other public ways for the purposes herein set forth shall not be exclusive, and the City reserves the right to grant a similar use in said streets and alleys to any other person or persons. Wherever possible, the company shall use existing facilities of public utility companies, provided said grantee, or its assigns, first secures the permission and consent of the aforesaid public utility companies concerned, to affix said cables or wires, or other apparatus to their pole facilities.

Section 4. Poles or towers shall be so erected so as not to interfere with the traffic over the streets and alleys, and the location of all poles, towers or other structures on public property shall be placed with prior written approval and under the supervision of the City of Boulder as to such location, giving consideration to the reasonable operation of the same; providing further, that such location on public property shall not be a vested interest and the same shall be

removed by the grantee whenever, in the sole determination of the City, the same restrict or obstruct the operation or location of said streets, alleys, or public places, or municipal or franchised utilities located therein.

Section 5. Any and all streets and sidewalks disturbed or damaged in the construction or maintenance of said cables, lines and other appurtenances shall be promptly repaired by the grantee, at its expense, and to the satisfaction of the City of Boulder.

Section 6. The grantee shall be subject to all ordinances now in force, or that may hereafter be enacted, relative to the use of the streets, alleys, sidewalks and public ways and places of the City of Boulder.

Section 7. The covenants, conditions and limitations of this permit shall be binding upon the successors and assigns of the grantee, and the right granted hereunder shall not be assigned or subleased by the grantee without the prior written approval of the City of Boulder.

Section 8. The City reserves the right to adopt, from time to time, in addition to the provisions herein contained, such ordinances as may be deemed necessary to the exercise of the Police power; provided, that such regulations shall be reasonable and not destructive to the rights herein granted and not in conflict with the laws of the United States, the State of Colorado, or other local laws or regulations.

Section 9. The company hereby expressly agrees that it will save, keep harmless and defend the City of Boulder from any and all damages and liabilities it may have or sustain by reason of the construction, operation or maintenance of the system. This will be guaranteed to the City by a Public Liability and Property Damage Policy to the City in the amount of $100,000./$300,000. Public Liability, and $25,000./$50,000. Property Damage. Said policy to be negotiated and paid for by the grantee and kept in effect throughout the term of this permit.

Section 10. Within thirty (30) days after the final reading of this ordinance by the City Council, the grantee

shall signify its acceptance of the terms herein by filing in the office of the Director of Finance of the City of Boulder, a bond in the sum of Five Thousand dollars (5,000.00), to be executed by the grantee, with good and sufficient surety, running to and in favor of the City of Boulder, and conditioned upon the full and faithful performance of all the terms and conditions of the license or permit by said grantee, its successors and assigns, and upon the further condition that the City shall be saved harmless from any damage arising out of the exercise by said grantee, its successors and assigns, of the rights hereby conferred; and upon the expiration of 30 days after final reading and upon filing of said bond this license or permit shall be in full force and effect for the full term hereof. The requirement for bond running to the City of Boulder may be met by the grantee furnishing to the City a certificate, satisfactory to the Director of Finance and Record, showing that bond in like amount and for the same purposes and conditions as set forth herein has been furnished to a public utility company franchised by the City of Boulder.

Section 11. The grantee shall commence operations as a community antenna television system in the City of Boulder within three (3) years from the effective date of this ordinance, or shall otherwise forfeit all rights and privileges granted hereunder, but otherwise this permit to remain in full force and effect.

Section 12. As a further consideration of this permit or license, and in lieu of all occupation and license taxes or other taxes on the right to do business, the grantee agrees to pay on the 1st day of January annually to the City of Boulder a sum equal to two percent (2%) of its gross revenue derived from the conduct of its business within the corporate limits of the City or $100, whichever is the greater. The City shall have access to the grantee's books and records to verify the amount due the City as reported by the grantee.

This ordinance shall take effect upon the expiration of thirty (30) days from adoption and publication in accordance with the Charter of the City of Boulder.

INTRODUCED, READ AND ORDERED PUBLISHED this 15th day of September, A.D. 1964.

H. PAUL CROUCH

Mayor

Attest:

W. E. GAUSE

Director of Finance and Record
Ex-officio City Clerk

READ ON SECOND READING, PASSED AND ADOPTED this 6th day of October, A.D. 1964.

H. PAUL CROUCH

Mayor

Attest:

W. E. GAUSE

Director of Finance and Record
Ex-officio City Clerk

RESOLUTION NO. 70
(Series of 1966)

A RESOLUTION CONCERNING THE REVOCABLE PERMIT HERETOFORE GRANTED BY THE CITY COUNCIL OF THE CITY OF BOULDER TO COLORADO TELEVENTS, INC. FOR THE PURPOSE OF CONDUCTING THE BUSINESS OF A COMMUNITY ANTENNA TELEVISION SYSTEM IN THE CITY OF BOULDER; CONSENTING TO THE ASSIGNMENT OF SAID REVOCABLE PERMIT BY COLORADO TELEVENTS, INC. TO COMMUNITY COMMUNICATIONS COMPANY, A COLORADO CORPORATION; AND, SETTING FORTH DETAILS IN RELATION TO THE FOREGOING.

WHEREAS, the City Council of the City of Boulder by the adoption of Ordinance No. 2846, which was passed and adopted by the said City Council on the 6th day of October, 1964, granted a revocable permit to Colorado Televents, Inc., a Colorado corporation, for the purpose of conducting a business of community antenna television system in the City of Boulder; and,

WHEREAS, Section 7 of said ordinance provides in pertinent part as follows:

> **The covenants, conditions and limitations of this permit shall be binding upon the successors and assigns of the Grantee and the right granted hereunder shall not be assigned or subleased by the Grantee without the prior written approval of the City of Boulder.**

and,

WHEREAS, Colorado Televents, Inc. has requested the approval of the City of Boulder to the assignment of the revocable permit heretofore granted to Colorado Televents, Inc. to Community Communications Company, a Colorado corporation, and the City Council having considered said request is of the opinion that the same should be granted; provided however, that the assignee of said permit comply with the provisions of said revocable permit regarding the furnishing of a bond in the amount of $5,000 running to and in favor of the City of Boulder, and conditioning the faithful performance of

the terms and conditions of the said revocable permit by Community Communications Company, a Colorado corporation; and further, the furnishing of public liability and property damage insurance in favor of the City of Boulder and in the amount of $100,000-$300,000 public liability, and $25,000-$50,000 property damage, said policy to be negotiated and paid for by the assignee and to be kept in full force and effect throughout the term of said permit; and further, provided that all other requirements stated in said revocable permit have been or will be met by said Community Communications Company, a Colorado corporation; and,

WHEREAS, Colorado Televents, Inc. having heretofore fulfilled its obligations of said revocable permit and not being in default thereof;

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF BOULDER, THAT:

Section 1. The assignment by Colorado Televents, Inc. of its revocable permit heretofore granted by the City Council of the City of Boulder by the adoption of Ordinance No. 2864 to Community Communications Company, a Colorado corporation, be, and the same hereby is, subject to the conditions hereinabove mentioned, approved.

Section 2. The City Manager be, and he hereby is, authorized and directed to notify Colorado Televents, Inc. and Community Communications Company, a Colorado corporation, of the contents of the within resolution.

INTRODUCED, READ, PASSED AND ADOPTED this 5th day of July, 1966.

/s/ R. W. KNECHT

Mayor

Attest:

/s/ F. J. BURMANT, JR.

Director of Finance and Record
Ex-officio City Clerk

CITY OF BOULDER, COLORADO 80306
PUBLIC LIBRARY, 1000 CANYON BLVD., P.O. DRAWER H

May 25, 1979

Tim Chaffin
Systems Manager, TCI
1032 13th St.
Boulder, CO 80302

Dear Mr. Chaffin,

Library Director Marcelee Gralapp and I very much appreciate your taking the time to meet with us on 5/24/79 to discuss upcoming developments in TCI's Boulder system.

It is very exciting to see the system, at long last, moving towards a fuller realization of its potential. We look forward to your addition of channels for Home Box Office, Madison Square Gardens, Christian Broadcasting and the independents you mentioned.

At the time of our meeting you also stated TCI's intent to connect the Boulder Public Library studio (including line feeds from City Hall and the Senior Center) with the system head end. Ms. Gralapp and I were particularly pleased by this commitment. If, at your earliest convenience, you can supply me with a rough timetable for these installations I will be happy to coordinate arrangements with the City departments involved.

Thank you again for your time and for your commitment to bringing about a truly active cable system for the Boulder community.

Sincerely,

RICHARD VARNES
Director Media & Programming
Boulder Public Library

cc: Robert Westdyke
Melba Shepard, John Torres

July 1, 1979

Mr. Robert Westdyke
City Manager
City of Boulder
Municipal Center
Boulder, Colorado 80302

Dear Mr. Westdyke:

This letter is to introduce the Boulder Communications Company (BCC) and its proposal to bring a comprehensive, public interest oriented cable communications system to the citizens of the City of Boulder.

Accompanying this letter is the proposal and, for your convenience, a brief summary of the proposal. The complete proposal contains an ordinance setting forth features which the City, in past efforts, has ascertained as being in the best interests of its citizens. Also included is a resolution which BCC proposes that the City adopt. This resolution would grant BCC a permit to operate and construct a cable communications system, such permit being contingent only upon BCC showing the city evidence of financial ability to build the system.

We have also included a study which reviews the application of cable communications to various existing and potential government services.

BCC is aware that Tele-Communications, Inc. (TCI) is presently operating a small cable antenna system in the "Hill" area of Boulder. TCI is operating under a permit granted another company in 1964 and subsequently assigned to TCI. The permit contains no provisions for public services to Boulder citizens. In fact, TCI has made no efforts to date to provide service to Boulder other than improved reception of Denver signals, nor has it expanded its system beyond the Hill area.

Whatever action the City takes in regard to TCI, it is the plan of BCC to begin building its system as soon as feasible after the City grants BCC its permit.

BCC is composed of six local citizens. Thomas Cross was a city employee assigned to telecommunications management.

One of his tasks was to advise the City in regard to cable communications. He is presently associated with Storage Technology Corporation. Mr. Kerner is a lecturer in communication law at the University of Colorado, a telecommunications consultant and an attorney whose practice is limited to communication matters. Michael Thompson has been associated with such Boulder firms as Itel, Storage Technology Corp., and NBI. He has a strong background in computer technology, marketing and finance. Donald Passalacqua was a C.P.A. with Arthur Anderson, was a partner in the Boulder accounting firm of Passalacqua, Ford & Fitzpatrick and presently practices public accounting in Boulder. Barry Telleen has been a Boulder resident since 1959. For many years he has been involved in real estate investment in Boulder. Dennis DuBé is Director of the Communications Institute of Boulder, and is presently executive Director of the Boulder Free School. Detailed profiles of the above individuals are included in the proposal.

It should be noted that all of the general partners of BCC are local citizens. It is contemplated that all of the equity participants will be Boulder citizens who will be served by the system and have an interest in service to the City.

Associated with BCC is Coaxial Analysts, Inc., a Denver company that serves the cable television industry with system design, management and financial services. This association provides the partnership with "hands on" experience and assures the City that the system will be constructed in an efficient, computer-assisted manner. Brochures describing Coaxial Analysts are included with this proposal.

BCC looks forward to bringing its fellow citizens the finest, state-of-the-art cable communications system. As set forth in our proposal we plan to offer local origination programming as well as the more exciting "premium" programming. Working with those citizens involved in operating the public access channel, the City government channel and the school channel will be an exciting and creative endeavor. We also are enthused about exploring the exploding revolution in information services.

Inasmuch as Boulder is our home, it is important to BCC that the citizens of Boulder receive the best that cable has to offer. We plan to see that they do.

Kind Regards,

IRVING J. KERNER

Irving J. Kerner

November 28, 1979

Mayor Ruth Correll
320 20th Street
Boulder, Colorado 80302

Dear Ruth:

Prior to tomorrow's study session I would like to share a few thoughts with you regarding Boulder's cable situation.

First, I want you to know that we at BCC firmly believe that we are best qualified to bring a progressive, public interest oriented cable system to Boulder. In our talks with such diverse interests as the University, Naropa, the Chamber of Commerce and numerous citizen groups it has become clear that Boulder citizens desire to have cable services and strongly support our efforts. Thus, although we would prefer to have a permit issued immediately to BCC based upon the new policy ordinance, we are confident about our ability to be successful in a request for bid situation.

One point should be clear to Council, the decision to proceed with the request for bids is not required by legal necessities. It does not solve any legal problems the City may face in the future, including problems of an anti-trust nature.

If Council approves a request for bid approach, the existing permit must either be revoked or the permit holder must agree not to expand. If such is not the case, the request for bid is a sham since no company will bid knowing that TCI is building while it is bidding. The economics of cable are such that once TCI were to build the system no other company could compete.

From our point of view we see no necessity for bids. The City has been open to proposals for years. Last summer we came forth and offered to build a progressive, state-of-the-art system. We have shown our sincerity by developing a community dialogue, and attempting to involve the total community in our proposal. Our proposal contains everything the City has sought from cable, and more. We are ready to begin construction in January. We suggest the City revoke the TCI permit, grant us a new permit consistent with the new policy ordinance

and allow us to bring cable service to Boulder. In the event the City were to take this approach, we would purchase the TCI system and maintain service to its subscribers.

If Council determines that a request for bid approach is required, BCC will participate and expects that Council and the City Manager's staff will come to know that which BCC firmly believes, that is, that there is no question that we are best suited to bring cable services to Boulder and will do so in a superior manner.

Thank you for your attention to this.

Kind Regards,

Irving J. Kerner

TO: Robert G. Westdyke, City Manager, and Members of the City Council

FROM: Joseph N. de Raismes, City Attorney

RE: Legal Constraints Concerning City Regulation of Cable Communications

DATE: December, 1979

At the study session held on Thursday, November 29, 1979, discussion was held concerning the status of cable communications in Boulder. Specifically, the possibility was raised of changing the status of the existing CATV (community antenna television) permit, held by Telecommunications, Inc. ("TCI") and of considering a proposal by Boulder Communications Company ("BCC"), as well as proposals of other potential cable communications operators who have expressed interest since the City Council's last study session, in July. The alternatives are summarized in the memorandum from the Library Director, Marcalee Gralapp, to the City Manager and City Council, dated November 27, 1979.

During the discussion, it became apparent that a major question needs to be addressed prior to any further discussion of the alternatives available to the City, concerning the status of the existing permit (Ordinance No. 2864) held by TCI. This memorandum addresses the legal constraints to be considered in assessing the alternatives now available to the City. However, the analysis contained herein should be viewed as preliminary, and more detailed analysis will be required prior to a final decision in this matter.

CONCLUSIONS:

The City may regulate cable communications over the public right of way, but the extent of regulation must be analyzed in terms of the scope of the City's home rule authority and anti-trust exposure. The TCI permit may be revoked at will, but may not be revoked for an anti-competitive reason. The bidding process proposed by the staff is a viable option, subject to careful attention to the items subject to bid. Notwithstanding economic constraints and possible inconvenience or mischief, the open competitive process proposed by Mr. Danish is also a viable option, subject to careful attention to minimum standards.

FACTS:

Cable communications poses a great potential for innovative communications covering many activities, over and above the inherent data transmission and entertainment value. The advent of satellite transmission capabilities having made increased programming readily available, the existing Boulder permit holder, TCI, proposed last spring to expand the CATV system existing in the "Hill" area of the City. That system, which has been minimally expanded and minimally maintained during the 15 years of its existence, has functioned solely for the retransmission of broadcast signals in the "shadow" area created by Table Mesa.

In 1972 and 1975, the City went through an extensive study of alternatives in cable communications and entertained proposals from inter alia, Tele-Prompter, Sam Street and Associates, and Cable Service of Boulder. For various reasons set forth in the July 25, 1979, memorandum from the Library Director to the City Manager and City Council, none of those proposals came to fruition. However, in each instance, attempts were made to increase the spectrum of cable communications services, to introduce elaborate and innovative broad band communications systems, and to maximize local access to and control of such systems. Meanwhile, since 1964, TCI and its predecessors have essentially "warehoused" the existing CATV system on the Hill.

With the spring announcement that TCI intended to expand its system and the proposal by BCC, and expressions of interest by other potential cable communications operator, the stage is set for a decision by the City Council, which has the responsibility to assure that its control over use of the public right of way is used in such a manner as to assure that the citizens of the City of Boulder get an even break. As stated in the July 25, 1979, memorandum from the Library Director:

> "In the staff's opinion this may well be the last opportunity to take action on improving CATV service. The company

> that builds out the system will be in a virtually unassailable position by the time the permit renewal comes up in 1984. Consequently, it is extremely important to have the best system possible in operation by the time of the permit renewal."

The City Council has expressed some concern over the "Blue Sky" aspects of the cable communications systems which were debated in the early 1970's. However, the City Council has expressed interest in the BCC proposal, and dissatisfaction with the performance of TCI.

In the study session held last Thursday, the staff recommendations were entertained, as was an alternative recommendation by Mr. Danish to issue additional non-exclusive permits. The City Council requested that the City Attorney discuss the constraints applicable to these alternatives, with particular emphasis on the power of the City Council to restrict the activities of the current permittee, TCI.

LEGAL CONSTRAINTS:

In the July 25, 1979 memorandum, the staff indicated that cable communications "is essentially a natural monopoly." However, this point of view has not reached general acceptance. The only note on the question comes to the opposite conclusion:

> Unlike water, gas, and electric companies, where there is great public inconvenience in having numerous concerns serving the same geographical market, CATV is not a natural monopoly. There is only the inconvenience, if that, of having another pair of wires involved in having another additional CATV in a geographical market . . . it would thus seem that the scope of regulation which is natural for natural monopolies is not herein necessary. 41 A.L.R.3d at 384.

The same position was taken by the Public Utilities Commission of the State of Colorado in Decision No. 70749 (January 25, 1968), which stated:

> "The CATV system operators now rendering CATV services in the State of Colorado appear to have convinced

> the municipalities that CATV services should be monopolistic in nature. The argument advanced seems to be that a CATV system has virtually the same characteristics as, for example, an electric system. In other words, it is necessary in order to provide CATV services to construct a system at great cost, and therefore, a duplicate system would constitute considerable economic waste. On the surface, this argument appears to be tenable. We have grave doubts, however, as to whether the actual facts would support the theory. *Id.* at 17.

The PUC went on to find that it had no jurisdiction to regulate CATV services, that the Federal Communications Commission had disclaimed any intent to attempt to regulate such services and that:

> It is extremely doubtful if the municipalities of the State of Colorado have such jurisdiction despite their efforts to achieve some sort of rate regulation by in effect conditioning revocable licenses to utilize streets, alleys and utility easements upon specified . . . rate schedules. If the rendition of CATV services is to be treated as the rendition of a public utility service, then the Legislature of the State of Colorado should be requested to pass the required legislation placing the rendition of such services under proper regulations. *Id.* at 19.

Since the PUC's decision in 1968, the FCC has retreated from its prior rule in cable communications regulation, and has deleted its prior requirement that CATV operators show evidence of local operating authority. Provisions which required public hearings before awarding a permit, a maximum franchise of 15 years, a specific construction schedule and a local complaint procedure have likewise been made non-mandatory. *Report and Order in Docket 21002,* 66 FCC 2d 380 (Sept. 30, 1977).

The only standard retained is the fee limitation, which is also proposed for repeal. *Further Notice of Proposed Rulemaking in Docket 21002,* FCC 79-228, Mimeo No. 5617. Finally, the FCC's channel capacity and access rules have been stricken

down by the U.S. Supreme Court. *FCC* vs. *Midwest Video Corp.* ____U.S.____, 47 L.W. 4335. (April 2, 1979). Citing Section 3(h) of the Communications Act of 1934 and its prior decision in *Columbia Broadcasting System, Inc.* v. *Democratic National Committee,* 412 U.S. 94 (1973), the Supreme Court concluded that Congress had already determined that broadcast facilities should not be treated as common carriers and that licensees should retain "broad journalistic discretion." Therefore, the Supreme Court found the FCC's access rules to be ultra vires and also stated that the first amendment concerns raised by cable communications operators were "not frivolous." 47 L.W. at 4340.

Thus, with both the PUC and the FCC's jurisdictions in doubt, only municipal corporations have been left with the option of seeking to regulate cable communications services in Colorado.

However, since the last consideration by the City of Boulder of its appropriate role in cable communications regulation, the Supreme Court decision of *City of Lafayette* v. *Louisiana Power and Light Company,* 435 U.S. 389 (1978), has greatly restricted the "state action immunity" from the operation of the anti-trust laws previously available to municipal corporations under the leading case of *Parker* v. *Brown,* 317 U.S. 341 (1943). The *City of Lafayette* decision requires that an explicit state policy to displace competition with regulation or monopoly public service be shown prior to recognition of the immunity. 435 U.S. at 413. The Supreme Court's test is unfortunately quite vague:

> While a subordinate governmental unit's claim to *Parker* immunity is not as readily established as the same claim by a state government . . . , an adequate state mandate for anti-competitive activities of cities and other subordinate governmental units exists when it is found from the authority given the entity to operate in a particular area that the legislature contemplated the kind of action complained of. *Id.* at 415.

On September 27, 1979, the Colorado Attorney General rendered an opinion that existing Colorado legislation does not

contemplate the granting of monopoly rights or exclusive licenses to cable communications operators. The home rule power to grant easements on the public right of way is a limited power, with uncertain boundaries, especially when exercised to exclude willing competitors on grounds which go far beyond the protection of the right of way itself.

Thus, in *Community Antenna Television of Wichita, Inc.* v. *City of Wichita,* 471 P2d 360 (1970), the Kansas Supreme Court struck down a cable communications ordinance as ultra vires, and then proceeded to approve the identical ordinance in *Community Antenna Television* v. *City of Wichita,* 495 P2d 939 (Kan. 1972), based upon an intervening declaration of the 1972 Legislature, to the effect that the furnishing of cable communications service is "a private business effected with such a public interest by reason of its use of the public ways, alleys and streets, so as to require it to be reasonably regulated by cities." 495 P2d at 941. Thus, the scope of regulation permitted by the City's control over access to the public right of way may be restricted, just as the City's power to regulate competition is restricted under the *City of Lafayette* case, to the extent that the state law has delegated responsibility to home rule cities to regulate cable communications.

On the other hand, these procedural objections may be overcome by the use of non-exclusive contractual undertakings (*See, e.g., Ill. Broadcasting Co.* v. *City of Decatur,* 238 N.E. 2d 261 (Ill.App. 1968), which held that even though many of the conditions of a cable communications ordinance could not be imposed by the city, the grantee could agree to them.

The preceding discussion indicates the caution which the City Council must use in approaching any regulation of cable communications beyond measures intended to safeguard the right of way. However, given the failure of the state legislature and Public Utilities Commission to act, the inability or failure of the Federal Communications Commission to act, and the importance of cable communications to the public interest, the City may be compelled to act in a legal vacuum. Certainly, the Attorney General's opinion of September 27, 1979, while counseling against exclusive licenses, counsels in favor of

extensive regulatory involvement in order to safeguard competition, and although the case law is spotty, courts have supported municipal assertions of responsibility for cable communications regulation. *See, e.g.,* 41 A.L.R.3d 384; *Akers* v. *Floyd County Fiscal Court,* 556 S.W.2d 146 (Ky. 1977); *Borough of Scottsdale* v. *National Cable TV Corp.,* 368 A.2d 1323, 381 A.2d 859 (Pa. 1977), *TelePrompter of Mohawk Valley, Inc.* v. *Pumilio,* 394 N.Y.S.2d 945 (N.Y. 1977); *Cablevision, Inc.* v. *City of Sedalia,* 518 S.W.2d 48 (Mo. 1974); *G.E. Cablevision Corp.* v. *City of Peoria,* 591 N.E.2d 295 (Ill. App. 1972); *Bush* v. *Upper Valley Telecable Co.,* 524 P.2d 1055, 96 Ida. 83 (1973); *Cablevision of Winston-Salem* v. *Winston-Salem,* 3 N.C. 52, 164 S.E.2d 737 (1968); and *Illinois Broadcasting Co.* v. *City of Decatur, supra.* In each instance, regulation was approved as a contractual undertaking between the cable communications operator and the municipal corporation.

Assuming then that the City may regulate cable communications by conditioning the use of the public right of way upon contractual undertakings by the operators, in the absence of state legislation, the question posed is whether a bidding process, such as that suggested by the staff, is a permissible exercise of power. It appears that a bidding process would avoid or minimize any later claim that the contract was an adhesion contract and not enforceable because of the City's disproportionate bargaining power. Standards would have to be set upon which preference of one bid over another would be based. The more the standards are based upon the discretion of the grantor or franchisor, the more likely it is that an unreasonable restraint of trade can be found. *See, e.g., U.S.* v. *Paramount Pictures, Inc.* 334 U.S. 131 (1947). If a permit or franchise is denied, case law under the Sherman Act indicates that a valid business reason must be given for denying the franchise, *Mercury, Inc.* v. *Ford Motor Co.,* 542 F.2d 466 (8th Cir. 1976), and the standards may not be so restricting so as to apply to only one possible competitor. *George R. Whitten, Jr. Inc.,* v. *Paddock Pool Builders, Inc.,* 424 F.2d 25, 35 (1st Cir. 1970).

Assuming then that the City may regulate cable communications using the public right of way by a public bidding

process, the question arises as to the treatment of the existing permit holder, TCI.

The first question raised at the study session was whether a moratorium could be imposed upon expansion of the TCI cable communications system until a bid process had been completed. Such a moratorium could be imposed upon expansion of the TCI cable communications system until a bid process had been completed. Such a moratorium would clearly be pro-competitive, so that none of the problems raised by the *City of Lafayette* case would impede the City's pursuing a moratorium for such an interim period. In addition, although Section 8 of the permit states that future regulations must be reasonable and not destructive of the rights granted in the permit, the ability of the City to revoke the permit at its pleasure, its non-exclusive nature, and the lack of any particular territorial provisions, leads to the conclusion that a moratorium during the bidding process would be within the contemplation of the existing permit. If TCI is willing to accept such a moratorium on building, that would be the preferred course. However, in the event that TCI is unwilling to accept a moratorium, the same purpose can be achieved with a greater measure of legal certainty by revoking the existing permit and granting a new permit, which, upon acceptance of TCI by performance, would permit TCI to continue to operate in the area in which it now operates with its current cable communications system. It is always possible that TCI could refuse to accept a substitute permit and simply cease performing services in its designated area. However, that risk is present under the language of the current permit, no matter what the City does.

The second question posed is whether a moratorium could be imposed upon TCI after the close of the bidding process, assuming that it was not selected as a successful bidder. If TCI refused to abide by the standards set in the new permit ordinance, a case could be made for revoking TCI's permit on those grounds. However, to the extent that the City Council might wish to restrict TCI from expanding after the conclusion of the bidding process in order to allow the successful bidder to build out his system, significant antitrust problems are posed, which, in the absence of some form of state delegation of authority, makes this option extremely dangerous.

Alternatively, if the City Council should determine that TCI should not be permitted to expand because of its poor maintenance of its existing system and failure to expand that system, while warehousing its permittee status in Boulder, then the City Council is empowered, *on those grounds alone,* to revoke the TCI permit, in whole or in part. It would be possible to allow TCI to continue to operate within its existing area under this option, but the City Council must be careful to build the record for the principle that such revocation is based upon causes totally unrelated to the bidding process. It is clear in Colorado that no specific cause needs to be shown for termination of a contract under express provisions for termination at the option of one or either of the parties. *Ace Fine Service Inc.* v. *Colo. Dept. of Agriculture,* 141 Colo. 467, 348 P2d 962 (1960); *City of Ft. Collins* v. *Park View Pipe Line,* 139 Colo. 119, 336 P2d 716 (1959). However, the antitrust exposure makes a clear justification mandatory in this case.

Of course, should the City Council act to limit the current permit held by TCI, then special care must be taken in order not to interject any anti-competitive aspect into the bidding process, to insure that TCI would not be able to take action against the City based upon antitrust considerations. Thus, if there were only one successful bidder, substantial business justification would have to be given for the selection of only one bidder, and it would not be permissible to grant a "non-exclusive" cable communications permit while contemporaneously agreeing with the permittee that no additional licenses would be granted. In addition, the extent to which local control can be considered as an aspect of the decision would have to be carefully researched. Although the *Borough of Scottsdale* v. *National Cable TV Corp.* and *Cablevision of Winston-Salem* v. *Winston Salem,* cases, *supra,* indicate that local control may be considered, and BCC has indicated its desire that local control be a factor in the decision, the anti-competitive consequences of insisting upon local control require further study before that matter can be clearly determined. The other issues, including maximum price restraints, public access requirements, assignment and merger prohibitions, minimum building-out requirements, financial requirements, buy-back

arrangements, etc., all need to be examined carefully from both an authority and antitrust perspective in order to assure the enforceability of the permit.

The City Council has not discussed the question of whether a franchise would be appropriate rather than a permit. Although the City Charter and the statutes are permissive, non-exclusivity and the retention of a right of revocation may be sufficient to take cable television out of the franchise area under cases such as *Finney* v. *Estes*, 273 P.2d 638, Colo. (1954). The City Council should consider the possibility of proceeding in conformance with Sections 108 through 126 of the Charter, particularly in the event that a decision is made that the TCI permit should be revoked or limited. *Cf.* PUC Decision No. 70749 (1968).

In the memorandum presented by the Library Director to the City Manager and the City Council last Thursday and dated November 27, 1979, the recommendation was made that the City Council, together with the City Attorney, study what steps should be taken with regard to expansion of the present cable communications system operated by TCI during the selection process and thereafter. At the same meeting, BCC had presented a letter dated November 28, 1979, at which it suggested that: "no company will bid knowing that TCI is building while it is bidding. The economics of cable are such that once TCI were to build a system, no other company could compete." Subsequent to the meeting, inquiries were made of the cable communications operators which have expressed interest in building a system in Boulder. Of five companies which were polled, two indicated that they would be interested in submitting a bid in an open competitive situation, with no restrictions on the activities of the current permit holder. Three of five companies indicated they would be interested in submitting a bid if a formal bidding process were pursued, but again nothing was done to restrict the activities of the present permit holder. Only if the activities of the present permit holder were restricted in the period after bidding process would all five of the firms contacted be willing to submit a bid. This evidence is certainly equivocal and does not give the City Council very much guidance upon which to proceed.

In order to give the City Council the full scope of the antitrust problems raised, I am enclosing with this memorandum a copy of the September 27, 1979 letter of the Attorney General, a copy of an October 22, 1979, memorandum prepared by Dawson, Nagel, Sherman & Howard, Esqs., critiquing the Attorney General's letter and a copy of an article from the Urban Lawyer entitled "Exposure of Municipal Corporations to Liability for Violations of the Antitrust Laws: Antitrust Immunity after the *City of Lafayette* decision", by Hugh F. Bangasser. I would urge that these materials be consulted in order to study the kinds of difficulties which the City will be facing in the cable communications area, as well as in other areas following the *City of Lafayette* decision. It is clear that the fact that a particular activity may constitute a "natural monopoly" may not be sufficient in and of itself to allow a municipal corporation to act to insure that the monopoly act in the public interest. Perhaps a greater justification can be found for a municipal corporation acting to insure competition under such circumstances, but such activities may or may not be ultimately successful. Finally, the real issue in this case is not the construction of a cable to wire the City of Boulder but rather to preserve the first amendment rights of the citizens of the City to a free marketplace of ideas. In that regard, much further discussion will be required in order to develop an effective regulatory structure which comports with the extraordinary legal constraints in this area.

JNdR/mar
Attachments

January 11, 1980

RE: Boulder Cable Communications
Permit Application Process

Dear Sir:

The City of Boulder is pleased to invite your firm to apply for a permit to build a modern cable communications system to serve the citizens of this City.

There is currently in effect a permit to operate a cable TV system in Boulder. The Grantee is a wholly owned subsidiary of Community Tele-Communications, Inc. (TCI). TCI bought the system in 1966. The current permit will expire in 1984. It is both non-exclusive and revocable. A small shadow area of the City is currently being provided improved reception services by TCI under the present permit.

The City of Boulder desires to introduce competition into the Boulder marketplace for cable communications services. Consequently, on December 4, 1979 the City Council directed the City Manager to initiate an abbreviated selection process. On December 18, 1979 the City Council enacted a 90-day moratorium on cable television construction in Boulder to permit a competitive process to take place.

Please find enclosed a datasheet containing basic information about the City, an application form, and a draft of the City's cable communications permit ordinance. At its January 8, 1980 meeting, the City Council approved these documents in principle. The ordinance has not been adopted. It is understood that industry comments and suggestions may lead to modifications of the ordinance prior to its final adoption.

If your firm is interested in submitting an application, the following procedures shall be followed:

1) Complete the application form. Follow the format as closely as possible. Use marginal tabs to indicate each of the major sections.

If a form does not provide sufficient space, it may be retyped so long as all of the original questions are repeated. Re-number the pages of the completed application to ensure that every page has a number.

2) Insert any comments or suggestions regarding the draft cable communications permit ordinance in the application as Section 10.

3) Submit 20 copies of the completed application form to the City Clerk, Municipal Building, Boulder, Colorado by 3:00 p.m., Friday, February 29, 1980. Copies may be mailed to the City Clerk, P.O. Box 791, Boulder, Colorado 80306 as long as they arrive on or before the required date and time.

4) An application fee in the amount of one thousand dollars ($1,000.00) shall accompany the application form. This fee shall be in the form of a certified check or money order made payable to the City of Boulder.

Applicants will be evaluated according to the following criteria:

a) Financial soundness and capability. The evidence of financial capability furnished in each applicant's proposal must be such as to assure ability to complete the proposed system in the promised period of time.

b) Installation plan. All other things being equal, preference may be given to applicants with an installation plan providing for a rapid build out of a comprehensive cable communications system throughout the City of Boulder. Preference may also be given to applicants with an installation plan providing flexibility to adjust to new developments in cable technology.

c) Maintenance. All other things being equal, preference may be given to applicants with aggressive maintenance and repair practices and services.

d) Rate schedules. All other things being equal, preference may be given to applicants with reasonable installation and subscriber rate schedules, including future rate formulas which guarantee continued reasonable rates.

e) Demonstrated experience in operating a cable communications system. All other things being equal, preference may be given to applicants with experience in operating other cable communications systems. Such experience may include experience of the applicant's employees.

f) Service package. All other things being equal, preference may be given to applicants with the most attractive service package or packages, including plans and proposals for interconnection with other systems and services.

g) Other criteria. The City Council may consider other criteria which directly affect the ability of applicants to provide "state-of-the-art, community-service-oriented, cable communications services to the people of the City of Boulder".

Since the application form will be adopted and made a part of any cable communications permit ordinance, applicants should take special care to avoid making any unrealistic promises. Failure to perform in accordance with promises made in the application form may subject the Grantee to fines or other penalties, including revocation of the permit.

We look forward to receiving an application from your firm. If you have any questions regarding the procedures or any other matter, please feel free to write Mr. Richard Varnes, Director, Media Center, Boulder Public Library, P.O. Drawer H, 1000 Canyon Boulevard, Boulder, Colorado 80306, or telephone 303/441-3105.

Very truly yours,

ROBERT G. WESTDYKE
CITY MANAGER

RGW/cd
Enclosures

ORDINANCE NO.

AN ORDINANCE GRANTING A NON-EXCLUSIVE REVOCABLE PERMIT TO FOR THE CONSTRUCTION, ERECTION, OPERATION, MAINTENANCE AND REPAIR OF A CABLE COMMUNICATIONS SYSTEM IN THE CITY OF BOULDER, COLORADO; PERMITTING THE GRANTEE TO MAKE USE OF PUBLIC STREETS, ALLEYS, UTILITY EASEMENTS, AND, WITHOUT LIMITATION, ANY OTHER WAYS AND PLACES WITHIN THE CITY OF BOULDER FOR A PERIOD OF FIFTEEN YEARS; AND SETTING FORTH CONDITIONS AND DETAILS IN RELATION THERETO.

WHEREAS, it is the intent of the City Council of the City of Boulder, Colorado, to grant a 15-year, non-exclusive revocable permit to construct, erect, operate, maintain and repair a state-of-the-art, community-service-oriented cable communications system to
(the "Grantee"); to define the contractual relationship between the Grantee and the City; to ensure access to the system for a wide spectrum of potential programmers; and to provide for flexibility to accommodate future regulatory and economic developments;

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF BOULDER, COLORADO, THAT:

SECTION 1. SHORT TITLE.

This ordinance shall be known and may be cited as the "Boulder Cable Communications Permit Ordinance for
".

SECTION 2. DEFINITIONS.

For the purposes of this ordinance, the following words and terms shall have the meanings given herein:

(a) *"City of Boulder" or "City"* means all of the territory within the present and future corporate boundaries of the City of Boulder, Colorado.

(b) *"City Manager"* means the City Manager of the City of Boulder, or his authorized representative.

(c) *"City Council"* means the governing body of the City of Boulder.

(d) *"cable communications system,"* or *"system"*, sometimes referred to as *"cable tv system"*, *"catv system"*, or *"broadband communications network"*, means a system of antennas, towers, satellite earth stations, coaxial cable, amplifiers, microwave, fiber optics, waveguides, laser beams, conductors, converters, or, without limitation, any other facility, equipment, or other property constructed, erected, installed, or placed, in whole or in part, in, upon, over, under, across, or along any of the public streets, alleys, utility easements, or, without limitation, any other ways or places within the City of Boulder for the purpose of producing, receiving, transmitting, amplifying, storing, processing, or distributing audio, video, digital, or, without limitation, any other signals.

(e) *"Grantee"* means

(f) *"subscriber"* means a person or entity who or which elects to receive, for any purpose, a service provided by means of, or in connection with, the cable communications system authorized hereby.

(g) *"programmer"* means a person or entity who or which produces, brokers, sells, or, without limitation, otherwise provides program material for transmission, either live or from recorded media, by means of, or in connection with, the cable communications system authorized hereby.

SECTION 3. GRANT OF PERMIT.

(a) *Permission to Use Public Streets and Ways.*

Upon the effective date of this ordinance, and during the term hereof, the Grantee shall have the privilege and responsibility, subject to the conditions hereof, to construct, erect, operate, maintain, and repair, in, upon, over, under, across, and along the public streets, alleys, utility easements, and, without

limitation, any other ways and places within the City, such equipment and facilities as are necessary and appurtenant to the operation of a state-of-the-art, community-service oriented cable communications system.

(b) *Permit Non-Exclusive.*

The permit herein granted for the purpose herein set forth shall not be exclusive, and the City Council reserves the right to grant any similar or other permit to use said public streets, alleys, utility easements, and, without limitation, any other ways and places, to any person at any time during the term hereof; provided, however, that nothing contained herein shall be deemed to require the granting of additional permits if, in the opinion of the City Council, it is not in the public interest to do so.

(c) *Term.*

The term hereof, and all rights, privileges, obligations and restrictions pertaining hereto, shall be fifteen years from the effective date hereof, unless terminated or revoked sooner as herein provided.

(d) *Revocation.*

The City Council reserves the right to revoke this permit, and all privileges pertaining hereto, at its pleasure and discretion, at any time, without cause and without compensation to any person or entity, and no vested right shall accrue hereunder to the Grantee or any subscriber or programmer or any other person or entity, except for the City.

SECTION 4. OWNERSHIP AND CONTROL.

(a) *Direct and Indirect Transfers of Control.*

The permit granted hereby may not be assigned, sold, transferred or encumbered, nor may the Grantee merge with or combine with any other person or entity or contract with any other person or entity for the operation or maintenance of the cable communications system authorized hereby, unless the trans-

action is first approved by the City Council, by resolution, after a public hearing. However, in the case of an encumbrance, the City Manager may approve the transaction without a public hearing upon a determination that the transaction is purely a security transaction not designed to indirectly effect a sale. A shift of stock or other ownership or control of the Grantee shall be considered an assignment of the permit (1) if a transaction or series of transactions involves the acquisition of 10% or more of the ownership or control of the Grantee by any person, entity or group; or (2) if a transaction or series of transactions will result in any acquiring person, entity or group having 50% or more of the ownership or control of the Grantee, whose combined ownership or control, prior to the transaction or series of transactions is less than 50% of the total ownership or control. Absent extraordinary circumstances, the City Council shall not approve any transfer or assignment of this permit prior to completion of construction of the cable communications system authorized hereby.

(b) *Receivership, Foreclosure, and Similar Situations.*

The permit granted hereby may, at the option of the City Council, be terminated upon the appointment of a receiver or receivers or trustee or trustees to take over or conduct the business of the Grantee, whether in a receivership, reorganization, bankruptcy or other legal action or proceeding.

(c) *Right of City to Purchase System.*

(1) Upon the termination hereof, or upon any breach hereof by the Grantee, the City may, at its election, and upon the payment to the Grantee of a price equal to the fair market value of the physical assets of the cable communications system, as of the date of the taking, purchase and take over the system. The price shall not reflect or include, and the Grantee shall not receive, payment for any right or privilege or good will derived herefrom or hereunder; provided,

however, that the City Council shall have the right unilaterally to increase the purchase price provided for above, should it so elect, by an ordinance amendatory hereto; but such right shall not be construed as giving the Grantee a right to any price in excess of that set forth above. Upon the exercise of this option by the City and its delivery of an official notice of such action to any agent or employee of the Grantee, the Grantee shall immediately transfer to the City possession of all facilities, equipment and other property, real and personal, of the cable communications system authorized hereby, free from any and all liens and encumbrances not agreed to be assumed by the City in lieu of some portion of the purchase price set forth above. The Grantee shall execute such warranty deeds, bills of sale, and other instruments of conveyance to the City as shall be necessary for this purpose, upon the City's agreement to tender the purchase price set forth herein within a reasonable time, as determined by the City Council.

(2) The Grantee shall make it a condition of each contract, permit, authorization, consent or waiver obtained by or entered into by it with reference to its operations hereunder that the City shall have the right to succeed to all rights and privileges thereof upon the exercise of any right or privilege provided to the City hereunder.

(3) To protect the interest of the City hereunder, and in order that the City may exercise any right or privilege provided hereunder, the Grantee shall not make, execute or enter into any deed, deed of trust, mortgage, contract, conditional sales contract or any loan, lease, pledge, sale, pole agreement or any other agreement concerning any of the facilities, equipment or other property, real or personal, of the cable communications system authorized hereby, without the prior written approval of the City Manager. That approval shall be given unless the proposed transaction would, in the City Manager's judgment, adversely

affect the rights and interests of the City of Boulder or the people of the City of Boulder. The City Manager's action shall be subject to review by the City Council, at the request of the Grantee.

SECTION 5. RATES.

(a) *Schedule of Rates.*

The initial schedule of rates, rentals, and charges shall be as set forth in the Grantee's proposal, including the specified installation and monthly charges for providing subscriber services to residential, commercial, and agency subscribers. The Grantee shall file an amended schedule with the City Clerk at least thirty days prior to any change, and any change in any rate, rental, or charge may be delayed by action of the City Council at any time. All rates, rentals, and charges shall be non-discriminatory and uniform to all persons and organizations of like classes under similar circumstances and conditions. Nothing contained in this subsection shall be construed to prohibit the reduction or waiving of charges in conjunction with promotional campaigns for the purpose of attracting subscribers or programmers, nor shall this subsection be interpreted to prohibit the establishment of a graduated scale of charges and classified rate schedules to which any subscriber or programmer included within a particular classification shall be entitled.

(b) *Regulation of Changes in Rates.*

The City reserves the right, at its option and sole discretion, to regulate Grantee's rates at such time as the City Council determines that such regulation is in the best interest of the City of Boulder or the people of the City of Boulder, notwithstanding any rate or rate formula previously agreed upon or acquiesced to.

(c) *Advance Charges and Deposits.*

The Grantee may require subscribers to pay a deposit for converters and for connection to the cable

communications system authorized hereby and to pay for each month of subscriber services in advance at the beginning of each month. No other advance payment or deposit of any kind shall be required by the Grantee for subscriber services.

(d) *Disconnection and Reconnection.*

There shall be no charge for disconnection of any connection to the cable communications system authorized hereby. If any subscriber fails to pay a properly due monthly subscriber fee, or any other properly due fee or charge, the Grantee may disconnect the subscriber's connection to the cable communications system authorized hereby. Such disconnection shall not be effected until sixty days after the date of accrual of said delinquent fee or charge, and until at least ten days after reasonable written notice of intent to disconnect has been mailed to the subscriber in question. After disconnection, upon the payment of any delinquent fee or charge and the payment of the reconnection charge, if any, the Grantee shall promptly reinstate the subscriber's cable service.

(e) *Service to Multi-Family Units.*

The subscriber rates and charges imposed by the Grantee with respect to service to multi-family units shall not be increased or affected either directly or indirectly by reason of any payment or payments which the Grantee may make to the owner of any multi-family unit or any other person for the privilege of installing service or access to such multi-family units.

SECTION 6. GENERAL FINANCIAL AND INSURANCE PROVISIONS.

(a) *Payment to the City.*

(1) In consideration for authorization to construct, erect, operate, maintain and repair a cable

communications system hereunder, the Grantee shall pay to the City during the term hereof five percent of the Grantee's total gross revenues attributable to operations hereunder.

(2) Payments due to the City under this Section shall be computed quarterly, for the preceding quarter, as of March 31, June 30, September 30, and December 31. Each quarterly payment shall be due and payable not later than thirty days after the said dates. Each payment shall be accompanied by a brief report showing the basis for the computation and such other relevant facts as may be required by the City Manager.

(3) No acceptance of any payment shall be construed as an acquiescence that the amount paid is in fact the correct amount, not shall such acceptance of payment be construed as a release of any claim which the City may have for further or additional sums payable under the provisions hereof. All amounts paid shall be subject to audit and recomputation by the City.

(b) *Indemnification.*

(1) The Grantee shall indemnify and hold harmless the City of Boulder, the City Council, the City Manager and any agent or employee thereof at all times during the term hereof and specifically agrees that it will pay all damages and penalties which the City, the City Council, the City Manager or any agent or employee thereof may be legally required to pay as a result of granting this permit or any action or activity undertaken by any person or entity hereunder. Such damages and penalties shall include, without limitation, damages arising out of copyright infringements, or otherwise arising out of the construction, erection, operation, maintenance and repair of the cable communications system authorized hereby, whether or not any act or omission complained of is authorized, allowed or prohibited hereby. If legal action is filed,

either independently or jointly with the Grantee, to recover for any claim or damages covered by this indemnification, the Grantee, upon request to it by the City Council, shall defend the action and, in the event of a final judgment being obtained, the Grantee shall pay the judgment and all costs and hold the City, the City Council, the City Manager and any agent or employee thereof harmless therefrom.

(2) The Grantee shall pay and specifically agrees that it will pay all expenses incurred by the City in defending with regard to all damages and penalties as set forth in subsection 6(b)(1). These expenses shall include, without limitation, all out-of-pocket expenses, such as, without limitation, attorneys' fees and witness and discovery costs and expenses, and shall also include the reasonable value of any services rendered by the City Attorney, his assistants and other agents and employees of the City.

(c) *Surety Bonds.*

(1) The Grantee shall, concurrently with its acceptance of this permit, file with the City Clerk a corporate surety bond or bonds from a responsible company licensed to do business in Colorado in the amount of $250,000.00, assuring compliance by the Grantee with all terms and conditions hereof and providing that in the event that the Grantee should fail to comply with any term or condition hereof, or any term incorporated herein, there shall be recoverable, jointly and severally, from the amount of such bond, any damages or loss suffered by the City of Boulder or the people of the City of Boulder as a result thereof, as determined by the City Council, including, without limitation, the full amount of any compensation, indemnification or cost of removal or abandonment of any property of the Grantee, plus attorneys' fees and witness and discovery costs and expenses and the reasonable value of any services rendered by the City Attorney, his assistants and any

other agents and employees of the City. The bonds may be reduced in pro rata increments as construction requirements are completed, in the discretion of the City Council.

(2) All bonds provided by the Grantee pursuant hereto shall provide that at least thirty days prior written notice shall be given to the City by filing the same with the City Clerk in the event of any material alteration, cancellation or non-renewal of any portion of such bonds. Copies of all such bonds shall be furnished to and filed with the City Clerk, prior to the commencement of operations hereunder, and all amendments shall likewise be filed with the City Clerk, immediately upon execution.

(d) *Insurance.*

(1) The Grantee shall be required to maintain insurance in such forms and with such companies as shall be approved by the City Manager, such approval not to be unreasonably withheld, to protect the City, the City Council, the City Manager and any agent or employee thereof and the Grantee from and against any and all claims, injury or damage to persons or property, both real and personal, caused by the construction, erection, operation, maintenance or repair of any aspect of the cable communications system authorized hereby. The amount of such insurance shall be not less than the following:

General Liability Insurance	
Bodily injury per person	$ 150,000
Bodily injury per occurrence	400,000
Property damage per occurrence	400,000
Automobile Insurance	
Bodily injury per person	400,000
Bodily injury per occurrence	1,000,000
Property damage per occurrence	400,000

(2) Workmen's Compensation Insurance shall also be provided by the Grantee to its employees, as

required by the laws of the State of Colorado, as amended.

(3) All insurance policies shall provide that at least ten days prior written notice shall be given to the City by filing the same with the City Clerk in the event of any material alteration, cancellation or nonrenewal of any coverage afforded in such policies. Copies of all such policies shall be furnished to and filed with the City Clerk, prior to the commencement of operations hereunder, and all amendments shall likewise be filed with the City Clerk, immediately upon execution.

(e) *Effect of Bond and Insurance Limitations.*

Neither any bond or bonds nor any insurance policy or policies required or accepted by the City pursuant hereto, nor any damage recovered by the City thereunder, shall be construed to excuse unfaithful performance by the Grantee or limit the liability of the Grantee for damages, either to the full amount of the bonds of policies, or otherwise.

SECTION 7. DESIGN AND CONSTRUCTION PROVISIONS.

(a) *Interconnections.*

The Grantee may interconnect the cable communications system with all other contiguous cable communications systems, and the Grantee may interconnect with any other system or service.

(b) *Leased Access Channels.*

The Grantee shall provide a minimum of five video channels available for lease on a first-come first-served basis, at fair and published rates. Channels shall be made available for lease on an entire-channel basis or on a time-shared basis. Access to leased channels shall not be unreasonably denied. If the Grantee denies access to the headend and distribution system, or does not establish a fair and published rate in a timely manner upon request, the City Manager

may require such access or find the Grantee in breach hereof and take further steps hereunder. Nothing in this provision shall be construed to prohibit the Grantee from adding to the minimum number of leased channels, at the discretion of the Grantee.

(c) *Construction Standards and Requirements.*

(1) All of the Grantee's facilities, equipment and other property employed in any manner in the cable communications system authorized hereby shall be located, constructed, erected, operated, maintained and repaired in accordance with good engineering practices, by experienced poleline construction crews and so as not to endanger or interfere with the safety of any persons or property, or to interfere with any improvements which the City may deem proper to make, or to interfere in any manner with the rights of any property owner, or to unnecessarily hinder or obstruct pedestrian or vehicular traffic; further, all such plant and equipment and all construction shall meet all relevant specifications of the Federal Communications Commission, and other applicable Federal, State and City laws, ordinances, rules, regulations and requirements.

(2) The Grantee shall not erect, for any reason, any pole in the City of Boulder, except as may be reasonably required or necessary to fill small gaps in the existing aerial utility system, and then only with the advance written approval of the City Manager. The City shall actively assist the Grantee to the fullest extent practicable in obtaining reasonable joint pole or conduit use agreements from the owners of existing poles or conduits.

(3) Any opening or obstruction in or disturbance of any of the streets, alleys or public ways of the City made by the Grantee in the exercise of its privileges hereunder shall be done in strict compliance with the regulations and requirements of the City Manager.

(4) The Grantee shall locate the cable communications system authorized hereby in tandem with the

existing utility system, either aerial or underground, and shall share in the cost and use of underground facilities upon conversion of the existing aerial system.

(5) The Grantee shall, at its expense, protect, support, temporarily disconnect, reconnect, relocate in the same street or other way or place, or otherwise adjust any property of Grantee as required by the City Manager by reason of traffic conditions, public safety, street vacation, freeway, street or sidewalk construction, change or establishment of street grade, installation of sewers, drains, water pipes, power lines, signal lines or tracks, or any other public work or improvement.

(6) The Grantee shall, on the request of any private party holding an appropriate permit issued by the City, and after a minimum of forty-eight hours prior notice, temporarily raise or lower its lines to permit the moving of any building or other structure, and the actual expense of the same shall be paid by the party requesting the same.

(7) Upon failure of the Grantee to commence, pursue or complete any work required hereby or by any term incorporated herein within the prescribed time, and to the satisfaction of the City Manager, the City Manager may, at his option, cause such work to be done. The Grantee shall pay to the City the cost of such work as submitted to the Grantee in itemized amounts. Payment shall be made within thirty days after receipt of the itemized report.

(d) *Technology Level Requirements.*

The Grantee shall upgrade its facilities, equipment and services so that the cable communications system authorized hereby is as advanced as the current state of production technology will allow, but at no time shall the Grantee be required to upgrade its facilities if it demonstrates that such upgrading would

not be financially feasible or in the best interest of the City of Boulder or the people of the City of Boulder.

(e) *Emergency Alert and Use of Facilities.*

The cable communications system shall be engineered to provide an alert system to allow authorized officials to automatically override or supplement the signal on all channels and transmit and report emergency information. The Grantee shall, in the case of an emergency or disaster, make the entire system available without charge to the City or to any other governmental or civil defense agency that the City Manager may designate. The determination as to what shall constitute an emergency for the purposes of this subsection shall be made by the City Manager.

(f) *Standby Power.*

The Grantee shall install and maintain equipment capable of providing standby power for headend and trunk amplifiers for a minimum of two hours.

(g) *Accident Prevention Measures.*

The Grantee shall, at all times, employ ordinary care and install and maintain in use commonly accepted methods and devices to prevent failures and accidents which are likely to cause any damage, injury or nuisance of any kind.

(h) *Damage Repairs.*

Any damage caused to the property of any person or entity by any act or omission of the Grantee shall be repaired and compensated fully by the Grantee.

(i) *Permission of Property Owner Required.*

No cable, line, amplifier, converter, or, without limitation, other piece of equipment owned by the Grantee shall be installed without first securing written permission of the owner of any property involved. If such permission is later revoked, whether by the original or a subsequent owner, the Grantee shall at its

expense forthwith remove any equipment and promptly restore the property to its original condition or to a condition acceptable to the property owner, whichever is less.

SECTION 8. MAINTENANCE AND COMPLAINT PROCEDURE.

(a) *Maintenance.*

(1) The Grantee shall construct, erect, operate, maintain and repair all parts of the cable communications system authorized hereby in good condition throughout the entire term hereof.

(2) The Grantee shall render efficient service, make repairs promptly, and interrupt service only for good cause and for the minimal amount of time necessary. Such interruption, insofar as possible, shall be preceded by notice and shall occur during periods of minimum use of the cable communications system.

(3) The Grantee shall maintain an office in the City of Boulder which shall be open to the public during all normal business hours, have a publicly listed toll free telephone number, and be so operated that complaints and requests for repairs or adjustments may be received on a twenty-four hour basis. Written logs shall be maintained of all service interruptions and all complaints and their disposition and shall be forwarded quarterly to the City Manager for review.

(b) *Continuity of Service.*

It shall be the right of all subscribers to receive all available services insofar as their financial and other obligations to the Grantee are honored. In no event shall the Grantee discontinue operation of any part of the cable communications system authorized hereby as a result of any disagreement or problem with the City of Boulder, the City Council, the City Manager, any subscriber, or any other person. Upon any such discontinuation, the City shall have, in addition to the

right to seek all appropriate compensatory and other damages and equitable relief to enforce the provisions hereof, and of all terms incorporated herein, and the other rights and prerogatives provided herein, the right to purchase the system pursuant to subsection 4 (c) hereof.

(c) *Complaint Procedure.*

The City Manager shall have the responsibility for receiving and investigating those complaints regarding the performance of the Grantee which the Grantee has been unable to resolve to the satisfaction of any subscriber or potential subscriber. If the City Manager finds that the Grantee has failed promptly to perform pursuant to the terms hereof, the City Manager may require the Grantee to take such corrective action as may be deemed appropriate under the circumstances. Upon a failure by the Grantee promptly to undertake and complete such corrective action to the satisfaction of the City Manager, the City Manager may, in writing, declare the Grantee in breach of the terms of this Section and assess the Grantee as provided in subsection 8 (d) hereof.

(d) *Assessments.*

For failure of the Grantee to comply with corrective action required by the City Manager as set forth above, the Grantee shall pay to the City, as liquidated damages and not as a penalty, One Hundred Dollars per day for each day, or part thereof, that such noncompliance continues.

(e) *Letter of Credit.*

For the purpose of assuring compliance herewith, and with every term incorporated herein, the Grantee shall maintain a $5,000.00 letter of credit, in a form acceptable to the City Attorney of the City of Boulder, payable to the City as beneficiary during the entire term hereof. The Grantee shall restore the credit to a full $5,000.00 within thirty days after notification by the City of any withdrawal.

(f) *Right of Appeal to City Council.*

The Grantee may, within ten days after notification by the City of a withdrawal from the letter of credit set forth above, request the City Manager in writing to reconsider the penalty assessment. The City Manager shall respond in writing to a request for reconsideration, and may take such action as is deemed appropriate under the circumstances. The Grantee may appeal the decision of the City Manager to the City Council by mailing notice in writing within ten days of the date of the City Manager's response to the Grantee's request for reconsideration. The City Council may accept, reject, or modify the decision of the City Manager.

(g) *Prohibition of Passing Along Assessments to Subscribers.*

The subscriber rates and charges imposed by the Grantee shall not be increased or affected either directly or indirectly by reason of any payment or payments which the Grantee may be required to make to the City pursuant to this Section.

SECTION 9. RECORDS AND REPORTS.

(a) *Filings and Communications with Regulatory Agencies.*

Copies of all petitions, applications, complaints, orders and other communications exchanged between the Grantee and the Federal Communications Commission, or any other Federal or State regulatory commission or agency having or asserting jurisdiction with respect to any matters affecting the cable communications system authorized hereby, shall be submitted immediately to the City Manager.

(b) *Permits and Authorizations.*

The Grantee shall diligently seek all necessary permits, authorizations, consents and waivers required

by the conduct of its business, including, without limitation, necessary pole attachment contracts, necessary authorizations from the Federal Aviation Agency to construct such receiving antenna towers as may be required, and necessary authorizations or waivers from the Federal Communications Commission, and when any such permit, authorization, consent or waiver is requested or obtained or questioned in any manner, a copy of the communication shall be submitted immediately to the City Manager.

(c) *Reports.*

(1) The Grantee shall file quarterly with the City Manager reports of gross revenues signed by a certified public accountant. The Grantee shall also allow the City Manager to audit all of its accounting and financial records; all of its contracts and engineering, statistical, customer and service records; and all other records required to be kept hereunder. The Grantee shall at all times maintain complete and accurate books of account, records of its business and operations and other records required hereunder.

(2) The Grantee shall file annually with the City Manager a detailed plan showing the location of all portions of the cable communications system located within the City of Boulder.

(3) The Grantee shall also file annually with the City Manager an ownership report, indicating all persons, entities or groups who at any time during the preceding year controlled or benefitted from an interest in the Grantee or this permit of one percent or more and all creditors, secured and unsecured, to which the Grantee is obligated, in excess of one thousand dollars.

(4) The Grantee shall also file annually with the City Manager immediately upon their effectiveness with regard to any subscriber, copies of all rules, regulations, terms and conditions which it has adopted for the conduct of its business.

(d) *Subscribers' Right to Privacy.*

Neither the City, the Grantee, nor any programmer shall disclose personally identifiable information about any subscriber without the consent of the subscriber. The possibility of abuse in this area shall be discussed at every scheduled renegotiation session, as provided in subsection 10 (c) hereof. The Grantee shall not sell, or otherwise make available, lists of names and addresses of its subscribers, or any personally identifiable information concerning its subscribers or their viewing habits, to any person or entity, for any purpose whatsoever.

SECTION 10. RENEGOTIATION PROVISIONS.

(a) *Intent.*

In recognition of the fact that a great many regulatory, technical, financial, marketing, and political uncertainties are associated with all aspects of cable communications at the present time, it is the intent of the City to provide for the maximum feasible degree of flexibility in this permit throughout its term. The principal means for accomplishing this flexibility will be the scheduled renegotiation sessions provided for in this Section. It is intended that such renegotiation sessions will serve as a means of cooperatively working out solutions to problems that develop.

(b) *Scheduled Renegotiation Sessions.*

The Grantee and the City shall hold scheduled renegotiation sessions, on or about the second, fourth, seventh, tenth and thirteenth anniversaries of the effective date hereof.

(c) *Topics to be Negotiated.*

The following topics shall be discussed at every scheduled renegotiation session: rate structures, free or discounted services, application of new technologies, system performance and testing procedures, services provided and programming offered, extension

of service, subscriber complaints, privacy and human rights, community development and education, interconnection and judicial and regulatory Agency rulings. During the month preceding the scheduled renegotiation sessions, both parties shall specify the additional topics to be discussed. Topics in addition to those listed may be added by either party. Members of the general public may add topics by working through the negotiating parties.

SECTION 11. MISCELLANEOUS PROVISIONS.

(a) *Permit Agreement.*

Prior to the effective date hereof, the Grantee shall submit to the City a signed and notarized agreement which shall specifically state that the Grantee accepts and agrees to all of the provisions hereof. The permit agreement shall specifically state that any and all promises or proposals made to the City, the City Council, the City Manager and any agent or employee thereof, or any subscriber or programmer, at any time, by the Grantee or any agent or employee thereof, shall be incorporated herein and made a part hereof.

(b) *Prohibition of Discriminatory or Preferential Practices.*

Except as otherwise provided herein, the Grantee shall not, in making available the services or facilities of the cable communications system authorized hereby, or in its rules, regulations, terms or conditions, or in any other respect, make or grant preferences or advantages to any subscriber or potential subscriber to the system, or to any programmer or potential programmer seeking to use the system; and shall not subject any such person or entity to any prejudice or disadvantage. The entire cable communications system authorized hereby shall be operated in a manner consistent with the principle of fairness and equal accessibility of public access facilities, if any, equip-

ment, channels, studios and other services to all citizens, businesses, public agencies and other persons or entities having a legitimate use of the system; and no one shall be arbitrarily excluded from its use.

(c) *Compliance with Laws.*

The Grantee shall comply with all Federal, State and City laws, ordinances, resolutions, rules and regulations, heretofore or hereinafter adopted or established during the term hereof.

(d) *Right of Intervention.*

The City shall have the right of intervention in any suit or proceeding to which the Grantee is party. The Grantee shall not oppose, nor may it compel, such intervention by the City.

(e) *Right to Require Removal of Property.*

At the expiration of the term hereof, or upon revocation as provided herein, the City shall have the right to require the Grantee to remove, at its own expense, all portions and remnants of the cable communications system authorized hereby from the City of Boulder.

(f) *No Recourse Against the City.*

The Grantee shall have no recourse whatsoever against the City, the City Council, the City Manager, or any agent or employee thereof for any loss, cost, expense, or damage arising out of any provision or requirement hereof, the award hereof to the Grantee or, the enforcement hereof against the Grantee or any other person or entity whatsoever.

(g) *Non-enforcement by the City.*

The Grantee shall not be relieved of its obligations to comply with any of the provisions hereof by reason of any failure of the City to enforce prompt compliance.

(h) *Regulations.*

The City Manager may promulgate regulations necessary or convenient to the administration and enforcement hereof.

SECTION 12. SEVERABILITY.

If any one or more sections, sentences, clauses or parts of this ordinance shall, for any reason, be held invalid, the invalidity of such section, sentence, clause or part hereof shall not affect or prejudice in any way the applicability and validity of any other provisions hereof.

SECTION 13. EFFECTIVE DATE.

The effective date of this ordinance shall be

SECTION 14. REPEAL.

Ordinance No. 2846, as reenacted by ordinance No. 4474, is hereby repealed.

INTRODUCED, READ AND ORDERED PUBLISHED BY TITLE ONLY this day of A.D. 19 .

_____

Mayor

Attest:

_____

Director of Finance and Record
Ex-officio City Clerk

READ ON SECOND READING, PASSED AND ADOPTED this day of A.D. 19 .

_____

Mayor

Attest:

_____

Director of Finance and Record
Ex-officio City Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No.

COMMUNITY COMMUNICATIONS, COMPANY, INC., a Colorado corporation, doing business as BOULDER CABLE T.V., *Plaintiff,*	
VS.	**COMPLAINT**
CITY OF BOULDER, COLORADO, a municipal corporation; BOULDER COMMUNICATIONS CO., a partnership; THOMAS CROSS, JACK KERNER, MICHAEL THOMPSON, DONALD PASSALACQUA, BARRY TELLEEN, and DENNIS DUBÉ, *Defendants.*	

Plaintiff Community Communications Company, Inc. (hereinafter "CCC"), a Colorado corporation, doing business as Boulder Cable T.V., brings this action against the City of Boulder, Colorado, a municipal corporation (hereinafter "Boulder"), and other defendants, and alleges as follows:

FIRST CLAIM FOR RELIEF
INJUNCTION—VIOLATION OF THE FIRST AMENDMENT

1. This is an action to redress the deprivation under color of an ordinance of the rights secured to plaintiff by the First, Fifth, and Fourteenth Amendments to the United States Constitution and by 42 U.S.C. § 1981, and is brought pursuant to 42 U.S.C. § 1983 and 28 U.S.C. §§ 2201 and 2202. Jurisdiction is conferred on this Court by 28 U.S.C. §§ 1343 and 1331. The amount in controversy exceeds $10,000, exclusive of interest and costs.

2. Defendant Boulder is a municipal corporation located within the District of Colorado; the violations of law herein described have been and are being performed within the District of Colorado; and the resulting injury to plaintiff has been and is being suffered within the District of Colorado.

3. Plaintiff CCC at all times herein mentioned was, and now is, a corporation in good standing existing under and by virtue of the laws of the State of Colorado. CCC was and is the lawful owner and operator of a cable television system (hereinafter sometimes referred to as a "CATV" system) within the City of Boulder, State of Colorado.

4. Defendant Boulder was at all times herein mentioned, and now is, a municipal corporation existing under and by virtue of the laws of the State of Colorado, acting in its proprietary capacity.

5. On information and belief, Defendant Boulder Communications Co. is a partnership formed to establish and operate a cable television system in Boulder, Colorado.

6. On information and belief, Defendants Thomas Cross, Jack Kerner, Michael Thompson, Donald Passalacqua, Barry Telleen, and Dennis DuBé are partners in Boulder Communications Co. and residents of this district.

7. A cable television system is not a public utility. A cable television system is a disseminator of news, information, and entertainment. It disseminates the foregoing either (1) rebroadcasting signals originating at commercial or public broadcasting stations; (2) transmitting programming specialty produced for cable television systems and not available on commercial and public broadcasting stations, but only to cable television subscribers; and (3) producing original programming in its own studios which is disseminated only to subscribers of cable television.

8. A cable television system consists of extensive equipment, including central receiving stations, called headends; earth satellite receiving station; amplifiers; and a wire distribution system consisting of wire facilities to each subscriber running over public and private property pursuant to rights obtained by contract.

9. On October 6, 1964, for good and valuable consideration, Boulder executed a contract with Colorado Televents, Inc., which gave Colorado Televents, Inc., the nonexclusive right to construct a cable television system over the public rights-of-way within the city. Ordinance No. 2846 (attached hereto as Exhibit A) incorporates the terms of that agreement.

10. The agreement, by its terms, was to exist for a period of 20 years from the date of enactment of the ordinance.

11. On August 1, 1966, with the prior consent of Boulder, Colorado Televents, Inc., for good and valuable consideration, assigned all its rights and interests pursuant to its agreement with Boulder contained in Ordinance No. 2846 to CCC.

12. By virtue of this assignment, CCC obtained the nonexclusive right, among others, to build, operate, and maintain a CATV system within and throughout the entire City of Boulder as it existed at the time of the grant of the permit and as it would exist in the future. Additionally, by virtue of this permit CCC also obtained a property interest in Boulder's real property, *i.e.*, the nonexclusive right to use Boulder's present and future streets and rights-of-way for the operation of the CATV system.

13. At the time of the assignment, Boulder was aware of CCC's need to make a substantial investment in the cable television system, that substantial portions of said investment were made for the purpose of serving a distribution system covering the entire City of Boulder as well as adjacent unincorporated areas, and Boulder was further aware that CCC would need substantial time to recover its investment.

14. In reliance upon Boulder's express approval of the above-referenced assignment and the resulting relationship between CCC and Boulder, CCC paid substantial sums of money to Colorado Televents, Inc., to acquire said CATV system, and thereafter expended additional and substantial sums of money to maintain, upgrade, extend, and improve said system. In reliance upon the aforesaid, CCC has invested a sum in excess of $1,000,000.

15. During May 1979, defendants became aware of plaintiff's intent to complete its distribution system. Thereafter

and unbeknown to plaintiff, defendants Boulder Communications Co., Thomas Cross, Jack Kerner, Michael Thompson, Donald Passalacqua, Barry Telleen, and Dennis DuBé formed the desire and intent to operate a CATV system in Boulder, and, in an effort to avoid competition with plaintiff, and to gain an illegal and unfair advantage, conspired with Boulder to prevent plaintiff from the exercise of its lawful business as a disseminator of news, information, and entertainment.

16. On December 18, 1979, in breach of its contractual obligation, and for the purpose of accomplishing the purpose of the conspiracy as above set forth, the City of Boulder, by and through its City Council, enacted an emergency ordinance. Said ordinance is attached hereto as Exhibit B and is incorporated herein as though fully set forth.

17. On December 18, 1979, the City of Boulder, by and through its City Council, introduced and, upon its first hearing, passed Ordinance No. 4472. This ordinance is attached hereto as Exhibit C and is incorporated herein by reference as though fully set forth.

18. These two ordinances attempt to rescind the agreement between CCC and Boulder permitting CCC to use Boulder's streets and rights-of-way to operate a cable television system throughout the entire City of Boulder, and replace that agreement with one restricting the exercise of CCC's rights to that area of Boulder presently served by CCC until at least March 18, 1980.

19. The express purpose of said ordinances was and is to prevent plaintiff from the lawful exercise of its business as a disseminator of news, information, and entertainment for at least three months, if not permanently; and to give the individual defendants a competitive advantage over plaintiff.

20. The express purpose of Boulder's actions in terminating or revoking CCC's permit and restricting CCC's permit and restricting CCC's right to do business to a limited geographical area is to specifically preclude CCC from disseminating news, information, entertainment, and ideas and to expressly favor the individual defendants as an alternative speaker. Boulder's described ordinances and their intended purpose on their face

and as intended to be applied violate the guarantees of freedom of speech and press.

21. Boulder's said actions and the resulting interference with CCC's constitutional rights, if allowed to be continued, will cause irreparable injury.

22. By reason of Boulder's above-described actions, CCC's rights guaranteed by the First and Fourteenth Amendments to the United States Constitution have been violated and infringed. CCC has no adequate legal, administrative, or other remedy by which to prevent or minimize the continuing irreparable injury to its constitutional rights. Unless Boulder is enjoined from barring or otherwise interfering with CCC's rights to freedom of speech and press, CCC will continue to suffer great and irreparable injury as aforesaid.

WHEREFORE, CCC prays for judgment as hereinafter set forth.

SECOND CLAIM FOR RELIEF
INJUNCTION—VIOLATION OF EQUAL PROTECTION

23. CCC incorporates by reference Paragraphs 1 through 22 as if fully set forth herein, and further alleges as follows:

24. Boulder's actions preclude CCC from exercising its freedoms of speech and press in other than the area of Boulder presently served by CCC. This governmental preference for one speaker over another violates the equal protection clause of the Fourteenth Amendment of the Constitution of the United States, and 42 U.S.C. § 1981.

25. Boulder's said actions and the resulting interference with CCC's constitutional rights have resulted and will continue to result in irreparable injury to CCC.

26. CCC has no adequate legal, administrative, or other remedy by which to prevent or minimize the continuing irreparable injury to its constitutional rights. Unless Boulder is enjoined from barring CCC only from exercising its rights to

freedom of speech and press in certain areas of the city, CCC will continue to suffer great and irreparable injury as aforesaid.

WHEREFORE, CCC prays for judgment as hereinafter set forth.

THIRD CLAIM FOR RELIEF
INVERSE CONDEMNATION

27. CCC incorporates by reference Paragraphs 1 through 26 of the First and Second Causes of Action as if fully set forth herein, and further alleges as follows:

28. The agreement permitted Colorado Televents, Inc., and its assignee, CCC, to erect its cable television distribution system over Boulder's rights-of-way for a period of at least 20 years.

29. The right to construct these facilities is a valuable property right of CCC.

30. CCC has affixed parts of its cable television system to the real property consisting of Boulder's rights-of-way.

31. Passage of the ordinance attached hereto as Exhibits B and C effected a taking of CCC's contract right to provide cable television service throughout Boulder, including those areas of Boulder not presently served by CCC, and has deprived CCC of the value of its facilities affixed to Boulder's rights-of-way.

32. Boulder has failed to bring an action in eminent domain, or any other action, to acquire CCC's business, real property, and its contractually created property rights, or any part thereof, and has failed to pay to CCC just compensation or any compensation whatsoever for the taking of its contractually created real property rights and its real property.

33. The conduct of Boulder constitutes an unlawful taking of the total value of CCC's property rights as above-described without due process of law and without fair and just compensation therefor, in violation of CCC's said constitutional rights protected by the Fifth and Fourteenth Amendments to the United States Constitution.

34. By reason of said unconstitutional taking, CCC has been damaged in an amount exceeding $1,000,000, representing the loss to CCC of the value of its CATV system. When the full amount of said damages are known, plaintiff will seek leave of court to amend this Complaint.

FOURTH CLAIM FOR RELIEF
IMPAIRMENT OF CONTRACT

35. CCC incorporates by reference Paragraphs 1 through 34 of the First, Second, and Third Causes of Action as if fully set forth herein, and further alleges as follows:

36. In 1966, CCC became the assignee of the agreement between Boulder and Colorado Televents, Inc., the nature of which created a bilateral contract and thereby gained the right to operate and maintain a CATV system throughout the entire City of Boulder, as it presently existed and as it would exist in the future.

37. Boulder's actions in terminating or revoking CCC's said right and in geographically limiting CCC's right to do business unconstitutionally impaired CCC's contractual rights in violation of Article 1, Section 10, cl.1 of the United States Constitution.

38. By reason of this unconstitutional impairment of contract, CCC has been damaged in an amount exceeding $1,000,000, this representing the loss to CCC of the value of its CATV system. CCC will seek leave to amend this Complaint when the exact amount of said damages can be ascertained.

FIFTH CLAIM FOR RELIEF
CONSPIRACY TO UNREASONABLY RESTRAIN TRADE (SECTION 1 OF THE SHERMAN ACT)

39. CCC incorporates herein by reference the allegations of Paragraphs 2 through 38 above.

40. This claim arises under Section 1 of the Sherman Act (15 U.S.C. § 1) and is brought pursuant to Sections 4 and 16 of

the Clayton Act (15 U.S.C. §§ 15 and 26). This Court has jurisdiction over this claim under 28 U.S.C. § 1337.

41. Providing CATV service involves the doing of business of interstate commerce.

42. Plaintiff has at all relevant times been authorized to and able to provide CATV services to the relevant geographic market defined by the boundaries of the City of Boulder.

43. Defendants, and each of them, have at all relevant times known of plaintiff's intention to provide CATV service to unserved regions of Boulder, and have also known of plaintiff's significant expenditures and efforts towards that goal.

44. On information and belief, plaintiff alleges that Defendants Boulder, Boulder Communications Co., Thomas Cross, Jack Kerner, Michael Thompson, Donald Passalacqua, Barry Telleen, and Dennis DuBé have combined to unreasonably restrain trade and commerce by conspiring to impair and/or destroy CCC's right to construct and operate a CATV system within the City of Boulder.

45. In furtherance of the aforementioned conspiracies, defendants, and each of them, have taken certain actions which include, but are not limited to, the following:

(a) Defendant City of Boulder has consulted with potential competitors of CCC's for the purpose of (1) preventing plaintiff from providing CATV service to those areas of the franchise territory presently unserved; and (2) arranging for one of plaintiff's competitors to monopolize the business of providing CATV service in said unserved areas.

(b) Defendant City of Boulder has adopted the emergency ordinance and Ordinance No. 4472 (see Exhibit C), both dated December 18, 1979 (see Exhibit B), the joint and several effects of which are to restrict and/or destroy CCC's right to compete in unserved areas by restricting and/or destroying its right to expand its area of CATV service in the City of Boulder.

46. The adoption of the above-described ordinances and related actions by defendants were taken and adopted for an anti-competitive purpose and effect, and as such constitute a conspiracy to unreasonably restrain trade in the relevant product market of CATV services and in the relevant geographic market of the City of Boulder. Said anti-competitive actions further constitute a group boycott or concerted refusal to deal, and thereby constitute a *per se* violation of Section 1 of the Sherman Act.

47. As a direct and proximate result of the above-described acts and practices of defendant co-conspirators, competition in the relevant product market and geographic market will be lessened, and a monopoly will be created by unfair means, all to the detriment and destruction of competition in the relevant markets.

48. The violations of the antitrust laws alleged above directly affect and restrain interstate commerce.

49. The above-mentioned violations of the antitrust laws and other illegal actions of defendant co-conspirators, and each of them, have directly and proximately caused damage to plaintiff in amounts as yet unascertained, but which will be set forth in full when determined.

WHEREFORE, CCC prays for judgment as hereinafter set forth.

SIXTH CLAIM FOR RELIEF
BREACH OF CONTRACT

50. This cause of action for damage is asserted against the City of Boulder under the common law of the State of Colorado. Jurisdiction of the Court over this cause of action is ancillary and pendent to the Court's jurisdiction over plaintiff's First through Fifth Claims for Relief. Each cause of action derives from a common nucleus of operative facts and presents legal issues that are inextricably intertwined with those alleged above.

51. CCC incorporates by reference Paragraphs 3 through 22 of the First Cause of action as if fully set forth herein, and further alleges as follows:

52. On August 1, 1966, CCC succeeded to all the rights of Colorado Televents, Inc., existing as a result of the contract between Colorado Televents, Inc., and Boulder, dated October 6, 1964, whose terms are contained in Ordinance No. 2846.

53. The agreement was to remain in force for a period of 20 years. A copy of that agreement is attached as Exhibit A hereto.

54. Implied in said bilateral contract by and between CCC and Boulder are the covenants of good faith and fair dealing. These covenants of good faith and fair dealing include the promise that Boulder will do nothing to hinder or harm CCC's right under the contract or CCC's attempts to obtain the benefits of this said contract. Specifically, these covenants include the promise that Boulder will not revoke or terminate CCC's permit established by Ordinance No. 2846 absent good cause, *i.e.*, some action or inaction on CCC's part amounting to a substantial breach of its obligations. These covenants also include the promise that Boulder will do nothing to hinder CCC's ability to do business within Boulder and to obtain subscribers to its CATV system within said city.

55. Boulder's actions in terminating or revoking CCC's permit and in excluding CCC from operating within geographical areas previously accessible to CCC in order to create a competitive advantage for other cable operators constitute willful and deliberate breaches of the covenants of good faith and fair dealing.

56. By reason of the foregoing willful and deliberate breaches of contract by Boulder, CCC has suffered foreseeable consequential damages in an amount exceeding $1,000,000, representing the loss to CCC of the value of its CATV system in the City of Boulder. Finally, by reason of said breaches, CCC has suffered foreseeable and consequential damages in an amount as yet unascertained, representing the loss to CCC of anticipated profits which would be derived from future subscribers in the newly built and served areas. CCC will seek leave to amend this Complaint when the full amount of damages is ascertained.

WHEREFORE, CCC prays for judgment as hereinafter set forth.

SEVENTH CLAIM FOR RELIEF
IRREVOCABLE LICENSE

57. CCC incorporates by reference Paragraphs 3 through 22 of the First Cause of Action and Paragraph 50 of the Sixth Cause of Action as if fully set forth herein, and further alleges as follows:

58. Pursuant to the contract of October 4, 1964, Colorado Televents, Inc., and its successors in interest, including CCC, obtained a license to use all of Boulder's public rights-of-way to operate a cable television system. The term of that agreement was 20 years. That agreement is attached hereto as Exhibit A.

59. In reliance upon the grant of this real property interest, and with the prior knowledge and consent of Boulder, CCC expended substantial sums of money to acquire its CATV system from Colorado Televents, Inc.

60. In reliance upon the fact that its license extended to *all* Boulder's streets and rights-of-way, both present and future, CCC recently spent or became obligated to spend some $600,000 to upgrade and expand its CATV system.

61. Due to CCC's expenditures in reliance upon the license granted by Ordinance No. 2846, CCC's license is irrevocable until CCC has had the opportunity to recapture its substantial investments.

62. Boulder's actions in terminating or revoking this license without good cause and its recent imposition of geographical limitations on this license constitute intentional and unlawful interferences with CCC's license.

63. By virtue of Boulder's tortious and unlawful interferences with CCC's irrevocable license, CCC has suffered damage in an amount exceeding $1,000,000, representing the value of its CATV system built in reliance on Boulder's grant of irrevocable license. CCC will seek leave to amend this Complaint when the exact amount of its damages is ascertained.

EIGHTH CLAIM FOR RELIEF
LICENSE COUPLED WITH AN INTEREST

64. CCC incorporates by reference Paragraphs 3 through 22 of the First Cause of Action and Paragraph 50 of the Sixth Cause of Action as if fully set forth herein, and further alleges as follows:

65. Pursuant to the contract of October 4, 1964, Colorado Televents, Inc., and its successors in interest, including CCC, obtained a license to use all of Boulder's public rights-of-way. That agreement is attached hereto as Exhibit A.

66. Pursuant to the contract of October 4, 1964, Colorado Televents, Inc., and its successors in interest, including CCC, obtained the right to provide cable television to the residents of Boulder. Pursuant to the contract, the term of that right was 20 years.

67. Incorporated into the contract by which CCC obtained the right to provide cable television service throughout Boulder were covenants of good faith and fair dealing, which precluded termination of that right without just cause.

68. In order to exercise its contract right of providing cable television service throughout Boulder, CCC must have access to Boulder's public rights-of-way. The coupling of the license permitting access to Boulder's public rights-of-way with the right to provide cable television service to all residents in Boulder created an irrevocable license with an interest which extends at least until October 4, 1984.

69. By virtue of Boulder's unlawful revocation of CCC's irrevocable license coupled with an interest, CCC has suffered damage in an amount exceeding $1,000,000, representing the value of its CATV system. CCC will seek leave to amend this Complaint when the exact amount of damages is ascertained.

NINTH CLAIM FOR RELIEF
INTERFERENCE WITH PROSPECTIVE BUSINESS ADVANTAGE

70. CCC incorporates by reference paragraphs 3 through 22 of the First Cause of Action as if fully set forth herein, and further alleges as follows:

71. By virtue of the contract of October 4, 1964, and the subsequent lawful and approved assignment from Colorado Televents, Inc., to CCC of all the rights and obligations under that contract, CCC obtained the right to conduct a cable television business throughout Boulder for a period of 20 years, or longer.

72. Boulder and other named defendants have sought to interfere with CCC's lawful conduct of its business throughout Boulder.

73. The attempt to interfere with CCC's lawful business include, but are not limited to, the following:

(a) Boulder has conspired with defendants Cross, Kerner, Thompson, Passalacqua, Telleen, and DuBé, all doing business as Boulder Communications Co., for the purpose of (1) preventing plaintiff from providing CATV service to those areas of the franchise territory presently unserved; and (2) arranging for one of plaintiff's competitors to monopolize the business of providing CATV service in said unserved areas.

(b) Defendant City of Boulder has adopted the emergency ordinance and Ordinance No. 4472 (see Exhibit C), both dated December 18, 1979 (see Exhibit B), the joint and severable effects of which are to restrict and/or destroy CCC's right to compete in unserved areas by restricting and/or destroying its right to expand its area of service within the City of Boulder.

74. By virtue of this unlawful interference with CCC's lawful business, CCC has suffered damage in an amount exceeding $1,000,000, representing the loss to CCC of the value

of its CATV system, and damages in an amount as yet unascertained by representing the loss of prospective revenue to be derived from future subscribers, the loss of goodwill, and the loss of business reputation. CCC will seek leave to amend this Complaint when the exact amount of said damages is ascertained.

WHEREFORE, CCC prays for judgment as hereinafter set forth.

TENTH CLAIM FOR RELIEF
ESTOPPEL

75. CCC incorporates by reference Paragraphs 3 through 22 of the First Cause of Action and Paragraph 50 of the Sixth Cause of action as if fully set forth herein, and further alleges as follows:

76. Boulder was fully aware when it permitted CCC to succeed to the rights of Colorado Televents, Inc., contained in the contract of October 4, 1964, that CCC would expend substantial sums in reliance on the provision in the agreement providing for a 20-year term.

77. CCC in fact expended substantial sums in purchasing the system from Colorado Televents, Inc., and in providing cable television service.

78. Boulder was fully aware that CCC had spent, and would continue to spend, substantial sums in reliance on the 20-year term agreement. In addition, in May 1979, CCC, in reliance on the 20-year term of franchise, embarked on a further spending program.

79. Aware of CCC's plans, Boulder did nothing to indicate any disapproval or any intent to rescind its agreement with CCC.

80. Having permitted CCC to make substantial investments in reliance upon the 20-year term of the agreement, Boulder is now estopped from denying CCC's right to continue expanding its service to areas of Boulder not presently served, and CCC seeks a declaration from this Court to that effect.

WHEREFORE, CCC prays for judgment as hereinafter set forth.

ELEVENTH CLAIM FOR RELIEF
INVALIDITY OF EMERGENCY ORDINANCE

81. Plaintiff repeats and incorporates the allegations contained in Paragraphs 1 through 80 of this Complaint as if fully set forth herein.

82. On December 18, 1979, Defendant Boulder, acting through its City Council, passed an emergency ordinance which purported to immediately revoke CCC's right to build and operate a CATV system throughout the City of Boulder, and which purported to grant CCC the right to operate such a system only within a limited geographic area. A copy of the emergency ordinance is attached hereto as Exhibit B.

83. Boulder's actions in enacting such an ordinance are unlawful and violate, among other things, Sections 17 and 18 of the Charter of the City of Boulder, Colorado.

84. As a direct and proximate result of the enactment and enforcement of the aforementioned emergency ordinance, CCC has incurred damages in an amount which cannot as yet be precisely ascertained but which CCC estimates to exceed $1,000,000.

WHEREFORE, CCC prays that judgment be entered in its favor and against the defendants, jointly and severally, in treble the amount of damages ascertained at trial, plus plaintiff's costs and reasonable attorneys' fees incurred in the prosecution of this action; that the Court enter judgment declaring the aforementioned ordinances to be void and unenforceable, and enjoining Defendant Boulder from any attempt to enforce such ordinances; and that the Court enter an order enjoining the defendants, and each of them, from any further attempts to impair or restrain the plaintiff's construction or operation of a cable television system within the City of Boulder, Colorado, or

elsewhere, and for such other relief as is appropriate in the premises.

DAWSON, NAGEL, SHERMAN & HOWARD

By:_____

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ORDINANCE NO. 4515

AN ORDINANCE PARTIALLY REVOKING ORDINANCE NO. 2846 TO PLACE PERMANENT GEOGRAPHICAL LIMITATIONS UPON THE GRANTEE; TO REQUIRE INTERCONNECTIONS WITH OTHER GRANTEES; AND SETTING FORTH DETAILS IN RELATION THERETO.

WHEREAS, the City Council of the City of Boulder granted a revocable permit to Colorado Televents, Inc. in 1964 to conduct the business of a community antenna television system in the City of Boulder; and

WHEREAS, said permit was transferred and assigned to its current holder, Community Communications Company, Inc. (the current "grantee"), a wholly owned subsidiary of Community Tele-Communications, Inc., in 1966; and

WHEREAS, the City Council finds that advanced state-of-the-art cable communications services can and will enhance the quantity and quality of education, news, entertainment, institutional and residential services, cultural opportunities, and opportunities for self-expression available to the public, that such cable communications services can and will promote the convenience of the public and of the commercial and governmental institutions within the City, that such cable communications services may decrease the public's use of energy, and that such cable communications services can and will serve the public interest; and

WHEREAS, the City Council finds that Community Communications Company, Inc. during the past 14 years has failed and neglected to expand its community antenna television system with reasonable expedition to serve all, or even a major portion, of the citizens of the City, and that it has also failed and neglected to offer advance, state-of-the-art cable communications services to the citizens of the City; and

WHEREAS, the City has during the past 14 years received numerous complaints from customers of the grantee within the City concerning poor quality television reception, blacking-out of channels and programs, and unresponsiveness of the grantee in addressing and correcting these operational problems; and

WHEREAS, the City Council finds that during the past 14 years Community Communications Company, Inc. has frequently failed to provide adequate community antenna television service to its customers within the City; and

WHEREAS, the City has received complaints from citizens during the winter and spring of 1980, that, while constructing parts of its community antenna television systems within the City, Community Communications Company, Inc. has needlessly trespassed on private residential property, damaged private residential lawns, shrubbery and gardens, needlessly blocked private driveways and parking spaces, and acted with disregard for the legitimate rights, feelings, and concerns of residents; and

WHEREAS, within the past year, various cable communications companies have displayed interest in serving the community and have requested the City Council to grant permission to use the public right-of-way in providing that service; and

WHEREAS, during the winter and spring of 1980, the City undertook to enhance the diversity and quality of cable communications services available to the public by conducting an application and selection process for cable communications companies and by offering each applicant a permit to construct and operate a cable communications system within the City in the same geographic areas and in direct competition with one another and with the current grantee; and

WHEREAS, each of the cable communications applicants declined such a permit and requested a permit covering areas within the City from which Community Communications Company, Inc. would be excluded from constructing and operating any cable television system; and

WHEREAS, as a matter of policy, the City Council has looked with favor upon direct competition between cable communications companies within the same geographical areas as the most reasonable means of promoting innovative, diversified, and economical cable communications services within the City; and

WHEREAS, the City Council now reluctantly finds that direct competition between cable communications companies within the same geographical areas is not possible now or in the foreseeable future in the City, and finds further that such direct competition is not now or in the foreseeable future a feasible means of promoting innovative, diversified, and economical cable communications services within the City; and

WHEREAS, the City Council finds that innovative, diversified, and economical cable communications services can be best promoted within the City by placing permanent geographical restrictions on the current grantee, by granting within a reasonably short period of time a permit to a cable communications company other than the current grantee to provide service in other areas of the City, and by requiring reasonable interconnection between the systems of the community antenna television and cable communications companies within the City; and

WHEREAS, the City Council intends within a reasonably short period of time to conduct and complete an additional process of soliciting applications from interested cable communications companies, evaluating such applications, and granting a permit to another company to provide cable communications services in areas primarily outside those areas which may be served by the current grantee; and

WHEREAS, the City Council finds that it is in the public interest to initiate such a process in an expeditious manner; and

WHEREAS, the City Council finds that during the winter and the spring of 1980, Community Communications Company, Inc., has constructed and expanded parts of its community antenna television system in the City; and

WHEREAS, the City Council finds that at times during the winter of 1980, Community Communications Company, Inc., constructed and expanded parts of its community antenna television system in the City in violation of Ordinance Nos. 4472 and 4473; and

WHEREAS, Community Communications Company, Inc. has indicated to the City that it intends to continue to expand

and construct parts of its community antenna television system in the City, absent legislative action by the City Council; and

WHEREAS, the City Council finds that continued construction and expansion of parts of Community Communications Company, Inc.'s community antenna television system in the City will substantially disrupt and impede the process of soliciting applications from other interested cable communications companies, evaluating such applications, and granting a permit to a company other than the current grantee to provide cable communications services in the City; and

WHEREAS, the City Council finds that placing permanent geographical restrictions upon the operations of the current grantee will minimize, if not eliminate, such disruption; and

WHEREAS, the City Council finds that placing permanent geographical limitations upon the operations of the current grantee would not impair the present services offered by Community Communications Company, Inc. to City residents; and

WHEREAS, the City Council finds that placing permanent geographical limitations upon the operations of the current grantee will not impede its ability to expand its community antenna television services to numerous customers in addition to those it now serves, nor will it impede the grantee's ability to offer innovative, economical, state-of-the-art services to all its customers; and

WHEREAS, the City Council finds that it is in the public interest to place permanent geographical limitations upon the operations of the current grantee, to partially revoke Ordinance No. 2846, and to grant within a reasonably short period of time a permit to an additional company to provide cable communications services in other areas of the City, and to require reasonable interconnection between the systems of the community antenna television and cable communications companies within the City.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF BOULDER, COLORADO:

Section 1. That the revocable permit granted under Ordinance No. 2846 to Colorado Televents, Inc. and its assignee, Community Communications Company, Inc., to conduct the business of a community antenna television system in the City of Boulder is hereby partially revoked, as hereinafter provided.

Section 2. That Ordinance No. 2846 is hereby amended by the addition of the following:

> The grantee's right, permit, license and privilege to erect, construct, operate and maintain on, under and above the present and future streets, alleys, highways and other public ways and places of the City of Boulder, such poles, lines, cables, wiring and related appurtenances as are necessary for the purpose of originating, receiving, amplifying and distributing television and radio signals to the inhabitants of the City of Boulder shall be exercised only within the geographical boundaries set forth in Exhibit A, attached to this ordinance and incorporated by reference herein.
>
> In addition to any and all of the remedies available to the City, a violation of this Section shall be grounds for immediate revocation of the permit granted in Ordinance No. 2846 and forfeiture of the performance bond referred to therein.
>
> The right, permit and privilege herein granted is subject to such reasonable requirements as the City Council may subsequently adopt concerning interconnection with other cable systems in the City of Boulder.

Section 3. If any part or parts hereof are for any reason held to be invalid, such shall not affect the remaining portions of this ordinance.

INTRODUCED, READ AND ORDERED PUBLISHED IN FULL this day of A.D. 1980.

_____

Mayor

Attest:

_____

Director of Finance and Record
Ex-officio City Clerk

READ ON SECOND READING, PASSED, ADOPTED AND ORDERED PUBLISHED BY TITLE ONLY this day of A.D. 1980.

_____

Mayor

Attest:

_____

Director of Finance and Record
Ex-officio City Clerk

EXHIBIT A

An area comprised of the following three areas:

(1) A point at which the City limits of the City of Boulder on the West and the Northern boundary line of the National Bureau of Standards property intersects, East along the Northern boundary line of the National Bureau of Standards property to Broadway, North on Broadway to University Avenue, East on University Avenue to 17th Street, North on 17th Street to Canyon Boulevard, West on Canyon Boulevard to 9th Street, North on 9th Street to Spruce Street, West on Spruce Street to the Eastern boundary of Knollwood Village, North along the Eastern boundary of Knollwood Village to the City limits of the City of Boulder on the West, and South along the City limits to the point of beginning, plus any area used for any earth station and any area used for the transmission of signals from any earth station to the area set forth above.

(2) Plus, any area in which the grantee has constructed community antenna television cable plant by July 1, 1980.

(3) Plus, additional areas contiguous to either or both of the two areas specified above, so long as such additional contiguous areas—together with the two areas specified above—contain a total of no more than 9,887 dwelling units. Moreover, such additional contiguous areas shall consist of entire "population and housing districts", as established, effective since 1977, by the Planning Department of the City of Boulder.

MARCH 5, 1980 TRANSCRIPT
[p. 37/ln. 13 — p. 39/ln. 2]

Testimony by Mr. Pilnick
Examination by Mr. Boles

Q. You mentioned a third source of, I guess, lack of free market, and that is, I believe, economic factors you mentioned?

A. The third is the fact of economic facts of life in terms of the cost of building a cable system, and the number of dollars you have to get back, or the number of subscribers you have to have in order to pay for the cost.

Up until recently, and I would say until the last year or so, the cost of a cable system, it is required you have to get back something on the order of perhaps 35 to 50 percent of the homes in a particular area as subscribers. You can argue about the exact percentage, but somewhere about 40 percent or so is a reasonable industry guide.

If you build the system, the cost per mile would be high enough. So that if you have to get about 40 percent of the people in a particular area subscribing at the normal rates, the normal rates are anywhere from perhaps 6 to $10 a month for basic service, and 6 to $10 a month for pay T.V. channel, and if you didn't get something like 40 percent you, in most cases, were in trouble. You couldn't pay for the cost of the construction operation of the system.

Now, what happens if two companies go out in the same market? If they divide the market geographically, that's one situation. If they for one reason or another, if one cable company has half the city, and the other cable company has the other half, then they each have at least the possibility of getting as many subscribers as possible in their half, and they probably get perhaps 40 percent of the homes in their half of the area they are operating to subscribe, but if you have the so-called overbuilt situation where both companies are putting their

cable on the same poles and going after the same customers throughout the franchise area, the general industry statistics indicate that perhaps 40 to 50 percent of the total population will subscribe, and if you have to split that among two companies, assuming they both got an equal share, that would perhaps be 20 to 25 percent for each company, and without a huge increase in rates, which would meet subscriber resistance, it probably would be impossible for either company to make enough money to pay for the cost of the system.

MARCH 5, 1980 TRANSCRIPT

[p. 41/ln. 25 — p. 42/ln. 21]

Testimony by Mr. Pilnick

Examination by Mr. Boles

Q. Approximately how many cable systems are operating in the United States?

A. Including all the small ones and some that might be in either the master antenna category, there is something like 6,000 now.

Q. What does the term overbuilt mean?

A. Overbuilding is usually the phrase that's a trade phrase that means that two cable systems are going to compete for the same geographical area, and if the cable is on the poles it means the second company has to put their cable on the same poles as the first company, or if they are putting it underground, they have to use, in effect, the same underground areas. It means the same physical facilities have to be shared now among two cable companies rather than one, and you are also competing for the same customers.

Q. Of those 6,000 systems you mentioned, how many, to your knowledge, are overbuilt?

A. I am not aware of any myself. I have heard by secondhand information that perhaps half a dozen or so. So that it might be larger than that, but it is still, as far as I know, an insignificant fraction of the total number of systems.

MARCH 5, 1980 TRANSCRIPT

[p. 44/ln. 7 — p.46/ln. 7]

Testimony by Mr. Pilnick

Examination by Mr. Boles

Q. (By Mr. Boles) Are you familiar generally with the demographic characteristics of Boulder?

A. I have read some demographic information. I wouldn't characterize it as being expert or familiar, but I read some pertinent information.

Q. And that information is about 29,000 dwellings, about 90,000—

Q. [*sic*] 82,000 residents, I believe, and estimates that it would take about 200 miles of cable to cable the entire city.

Q. Now, given a city with those characteristics what, in your opinion, would be the likely result if the city issued cable television permits to any cable operator that applied as far as the ultimate number of companies that would survive in that particular territory?

MR. FARROW: Objection, Your Honor. It calls for pure speculation.

THE COURT: Well, I will let him speculate. Go ahead.

THE WITNESS: I think it would depend on when the permits were issued. If one company, as is the case in Boulder, had a permit considerably in advance of others, I would feel that that company would have a strong advantage because they have negotiated a pole attachment already. They have been working with the utilities in terms of clearing additional poles.

All of that would take time for anyone else, and the real question is, who would get on the poles first? Whoever would get on the poles first would have a tremendous advantage both economically and physically.

If you had that situation, where one company had a head start on the other, my evaluation would be that granting permits to others might or might not be an exercise in futility depending upon how much of the city the other companies really had a chance to capture.

If it was too far gone, if the first company had so much of an advantage either in construction itself, or being ready for construction, then you could issue a thousand permits, and of the thousand the remaining 999 permittees would really have no practical chance of building an operating system.

If you were starting from scratch, if you had no existing permittee, and you granted several permits, then it would be a question of, first, which company got into action quickest, and usually that would depend on the resources they could apply in money, in men, in personnel, in materials, and it would also involve whether or not the utilities wanted to deal with all the companies that had permits, or whether they wanted to take it on a first-come, first-serve basis. If they took it on a first-come, first-serve basis, again, the company there first would have an advantage.

MARCH 6, 1980 TRANSCRIPT

[p. 22/ln. 4 — p. 22/ln. 24]

Testimony by Mr. Varnes

Examination by Mr. Boles

Q. Did you have an occasion to talk with any representatives of TCI in the early part of December, 1979, or the end of November, 1979?

A. Throughout the fall I had had numerous occasions to contact, particularly the local System Manager of TCI, to keep track of how the whole process was developing.

In December I had a conversation with TCI's President, Mr. Malone, that was part of a survey that I did at the industry concerning how they would react to various theoretical scenarios that were being considered at the time.

Q. And what did you say to Mr. Malone, and what did he say to you during that?

A. I asked him about how he would feel about the prospect of Boulder throwing the doors more or less wide open to cable competition again, and receiving—accepting and granting applications pretty much to go out the door and begin doing business.

Q. What did he say?

A. He said, sure, it might make them build a little faster. They didn't mind. They would like to be the only show in town. It was okay with them.

[1] Ala. Code § 11-40-1; *Colvin* v. *Ward*, 189 Ala. 198, 66 So. 98 (1914).

[2] Alas. Const. art. X, § 11; *Jefferson* v. *State*, Sup. Ct. Op. No. 1084, 527 P.2d 37 (Alas. 1974); *Rubey* v. *Fairbanks*, 456 P.2d 570 (Alas. 1969).

[3] Ariz. Const. art. XIII, §§ 2-3; *City of Tuscon* v. *Arizona Alpha of Sigma Alpha Epsilon*, 67 Ariz. 330, 195 P.2d 562 (1948).

[4] Ark. Stat. Ann. §§ 19-1042, 19-1043; *Beharse* v. *City of Blytheville*, 254 Ark. 382, 493 S.W.2d 708 (1973).

[5] Cal. Const. art. XI, §§ 2,3,5-7; *Sonoma County Organization of Public Employees* v. *County of Sonoma*, 23 Cal.3d 296, 152 Cal.Rptr. 903, 591 P.2d 1 (1979); *Bishop* v. *San Jose*, 1 Cal.3d 56, 81 Cal.Rptr. 465, 460 P.2d 137 (1969).

[6] Colo. Const. art XX, § 6; *Delong* v. *City & County of Denver*, 195 Colo. 27, 576 P.2d 537 (1978);*Century Electric Service and Repair* v. *Stone*, 193 Colo. 181, 564 P.2d 953 (1977).

[7] Conn. Const. art X, § 1; Conn. Gen. Stat. Ann. §§ 7-188, 7-191a, 7-194; *Caulfield* v. *Noble*, 178 Conn. 81, 420 A.2d 1160 (1979).

[8] Del. Code. Ann. tit. 22, § 801-602; *Gage* v. *City of Wilmington*, 293 A.2d 555 (Del. Supr. 1972).

[9] Fla. Const. art. VIII, § 2; *State* v. *Roca*, 172 So.2d 230 (Fla. 1965).

[10] Ga. Const. art IX, § 3, ¶ 1; *Lee* v. *City of Jesup*, 222 Ga. 530, 150 S.E.2d 836 (1966).

[11] Haw. Const. art. VII, §§ 1-2; *Hawaii Government Employees' Ass'n* v. *County of Maui*, 59 Hawaii 65, 576 P.2d 1029 (1978).

[12] Idaho Const. art XII, §§ 1-2; *Bagley* v. *Gilbert*, 63 Idaho 494, 122 P.2d 227 (1942); *Voyles* v. *City of Nampa*, 97 Idaho 597, 548 P.2d 1217 (1976).

[13] Ill. Const. art VII, § 6 (a,i); *City of Urbana* v. *Houser*, 67 Ill.2d 268, 10 Ill.Dec. 239, 367 N.E.2d 692 (1977).

[14] Ind. Code Ann. § 18-1-1.5-16; *City of Bloomington* v. *Chuckney*, 165 Ind.App. 177, 331 N.E.2d 780 (Ind. App. 1975) (although holding here that power had been denied by statute).

[15] *Wilson* v. *City of Council Bluffs*, 253 Iowa 162, 110 N.W.2d 569 (1961).

[16] Kan. Const. art. XII, § 5; *Claffin* v. *Walsh*, 212 Kan. 1, 509 P.2d 1130 (1973); *City of Junction City* v. *Griffin*, 227 Kan. 342, 607 P.2d 459 (1980); *Junction City* v. *Lee*, 216 Kan. 495, 532 P.2d 1292 (1975).

[17] Ky. Rev. Stat. Ann. §§ 83.410-63.420; *Reconstruction Finance Corp.* v. *City of Richmond*, 249 Ky. 787, 61 S.W.2d 631 (1933).

[18] La. Const. art. VI, §§ 2-6; *Bradford* v. *City of Shrevport*, 263 La. 364, 305 So.2d 487 (1974).

[19] Me. Const. art. VIII, Pt. 2, § 1; *Lewiston Firefighter Ass'n, Local 785* v. *City of Lewiston*, 354 A.2d 154 (1976) (although field here found to have been preempted).

[20] Md. Const. arts XI-A, XI-E; *State's Atty* v. *City of Baltimore*, 274 Md. 597, 337 A.2d 92 (1975); *Birge* v. *Town of Easton*, 274 Md. 635, 337 A.2d 435 (1975).

[21] Mass. Const. art of amend. II; *Board of Appeals of City of Hanover* v. *Housing Appeals Com.*, 363 Mass. 339, 294 N.E.2d 393 (1973); *Bloom* v. *City of Worster*, 363 Mass 136, 293 N.E.2d 268 (1973).

[22] Mich. Const. art. VII, § 22; *Miller* v. *Fabius Township Bd, St. Joseph County*, 366 Mich. 250, 114 N.W. 2d 205 (1962).

[23] Minn. Const. art. XII, §§ 1-4; *A.C.E. Equipment* v. *Erickson*, 277 Minn. 457, 152 N.W.2d 739 (1967); *Town of Lowell* v. *City of Crookston*, 252 Minn. 526, 91 N.W.2d 81 (1958).

[24] Miss. Code Ann. § 21-17-1; *Steitenroth* v. *Jackson*, 99 Miss. 354, 54 So. 955 (1911).

[25] Mo. Const. art. VI, § 18; *St. Louis County* v. *Campbell*, 498 S.W.2d 833 (1973).

[26] Mont. Const. art. XI, §§ 5-6; *U.S. Mfg. & Distrib. Corp.* v. *City of Great Falls*, 169 Mont. 298, 546 P.2d 522 (1976).

[27] Neb. Const. art. XI, § 5; *City of Omaha* v. *Lynch*, 181 Neb. 810, 151 N.W.2d 278 (1967); *Dwyer* v. *Omaha-Douglas Public Bldg. Comm'n*, 188 Neb. 30, 195 N.W. 2d 236 (1972).

[28] Nev. Const. art. VIII, § 8; *Ronnow* v. *City of Las Vegas*, 57 Nev. 332, 65 P.2d 133 (1937).

[29] N.H. Const. Pt. I, art XXXIX; *City of Dover* v. *Wentworth-Douglas Hosp. Trustees*, 114 N.H. 123, 316 A.2d 183 (1974).

[30] N.J. Const. art. IV, § 7; *Inganamort* v. *Burough of Fort Lee*, 62 N.J. 521, 303 A.2d 298 (1973) (although case doesn't find conflict between ordinance and statute).

[31] N.M. Const. art. X, § 6; *Apodaca* v. *Wilson*, 86 N.M. 516, 525 P.2d 876 (1974).

[32] N.Y. Const. art. IX, §§ 1-2; *People* v. *Cook*, 34 N.Y.2d 100, 356 N.Y.S.2d 259, 312 N.E.2d 452 (1974).

[33] N.C. Const. art VII, § 1; *In re Incorporation of Indian Hills*, 280 N.C. 659, 186 S.E.2d 909 (1972).

[34] N.D. Const. art. VII, § 1; *Litten* v. *City of Fargo*, ____N.D.____, 294 N.W.2d 628 (1980).

[35] Ohio Const. art. XVIII, §§ 3,7; *Canada* v. *Phillips*, 168 Ohio St. 191, 151 N.E.2d 722 (1958).

[36] Okla. Const. art. XVIII, § 3(a); Okla. Stat. Ann. art. XI, § 13-109; *Lee* v. *Norick*, 447 P.2d 1015 (1968); *City of Wewoka* v. *Rodman*, 172 Okla. 630, 46 P.2d 334 (1935); *Pitts* v. *Allen*, 138 Okla. 295, 281 P.126 (1929); *Lackey* v. *Grant*, 29 Okla. 255, 116 P. 913 (1911).

[37] Ore. Const. art. XI, § 2; *Heinig* v. *City of Milwaukie*, 231 Ore. 473, 373 P.2d 680 (1962); *Schmidt* v. *City of Cornelius*, 211 Ore. 505, 316 P.2d 511 (1957); *City of Portland* v. *Welch*, 154 Ore. 286, 59 P.2d 228 (1936).

[38] Pa. Const. art. IX, § 2; *United Tavern Owners of Philadelphia* v. *School Dist. of Philadelphia*, 441 Pa. 274, 272 A.2d 868 (1971).

[39] R.I. Const. art. of amend. XXVIII, §§ 2-4; *Marro* v. *General Treasurer of City of Cranston*, 108 R.I. 192, 273 A.2d 660 (1971) (although statute found controlling here).

[40] S.C. Const. art. VIII, §§ 9,11; *Dunbar* v. *Spartanburg*, 266 S.C. 113, 221 S.E.2d 848 (1976).

[41] S.D. Const. art. IX, § 2.

[42] Tenn. Const. art IX, § 2; *Southern Ry. Co.* v. *City of Knoxville*, 223 Tenn. 90, 442 S.W.2d 619, Cert. den. 396 U.S. 1002 (1968).

[43] Tex. Const. art. XI, § 6; *Lower Colorado River Auth.* v. *City of San Marcos*, 523 S.W. 2d 641 (1975).

[44] Utah Const. art. XI, § 5; *Wadsworth* v. *Santaquin City*, 83 Utah 321, 28 P.2d 161 (1933) (although case deals with "general law" city).

[45] Vt. Stat. Ann. tit. 24, § 1971.

[46] Va. Const. art. VII, §§ 1-3; *Tabler* v. *Board of Supervisors of Fairfax County*, ____Va.____, 269 S.E.2d 358 (1980). But see also *Kisley* v. *City of Falls Church*, 212 Va. 695, 187 S.E.2d 168, appeal dismissed for want of a substantial federal question, 409 U.S. 907 (1972) for holding that city may, in exercise of its police powers, forbid an act where the state is silent.

[47] Wash. Const. art. XI, § 10; *City of Everett* v. *Fire Fighters Local 350*, 87 Wash. 2d 572, 555 P.2d 418 (1976).

[48] W.Va. Const. art. VI, § 39(a); *Toler* v. *City of Huntington*, 153 W.Va. 313, 168 S.E.2d 551 (1969).

[49] Wisc. Const. art. XI, § 3; *Glendale Professional Policemen's Assoc.* v. *City of Glendale*, 83 Wisc. 2d 90, 264 N.W.2d 594 (1978).

[50] Wyo. Const. art. XIII, § 1.

[51] P.R. Laws Ann. tit. 21, § 1107; *Cabassa* v. *Rivera*, 68 P.R.R. 654 (1948).

MUNICIPAL AUTHORITY

	Source of Authority				Extent of Authority			
	Directly from Constitution	From Legislature authorized by Constitution	From Legislature only	Home rule powers granted by Legislature	Municipality has complete local authority if no conflict with state legislation	Ordinance prevails over conflicting statute on matters of local concern	Charter ordinance prevails over conflicting special state legislation	City can act on statewide concern in absence of prohibition preemption by State
Alabama[1] *			X	X				
Alaska[2]	X				X			X
Arizona[3]	X				X	X		X
Arkansas[4]			X		X			
California[5]	X				X	X		X
Colorado[6]	X				X	X		
Connecticut[7]		X			X	X		
Delaware[8]			X		X			
Florida[9]		X		X				
Georgia[10]		X			X		X	
Hawaii[11]		X			X		X	
Idaho[12]	X				X		X	
Illinois[13]	X				X			
Indiana[14]			X		X			
Iowa[15]			X	X				
Kansas[16]	X				X		X	
Kentucky[17]			X	X				
Louisiana[18]		X		X				
Maine[19]	X				X			X
Maryland[20]	X				X		X	
Massachusetts[21]	X				X		X	X
Michigan[22]	X				X			X
Minnesota[23]	X				X		X	
Mississippi[24]			X	X				
Missouri[25]	X				X			
Montana[26]	X				X			
Nebraska[27]	X				X	X		
Nevada[28]		X		X				
New Hampshire[29]		X		X				
New Jersey[30]	X				X		X	
New Mexico[31]	X				X	X		
New York[32]		X			X			
North Carolina[33]		X		X				
North Dakota[34]		X		X				
Ohio[35]	X				X	X		
Oklahoma[36]	X				X	X		
Oregon[37]	X				X	X		
Pennsylvania[38]	X			X				
Rhode Island[39]	X				X		X	
South Carolina[40]		X		X				
South Dakota[41]	X				X			
Tennessee[42]	X				X		X	
Texas[43]	X				X		X	
Utah[44]	X				X		X	
Vermont[45]			X	X				
Virginia[46]		X		X				
Washington[47]	X				X		X	
West Virginia[48]		X		X				
Wisconsin[49]	X				X			
Wyoming[50]	X				X		X	
Puerto Rico[51]			X		X			

* Supporting footnotes located on reverse side of this chart

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No. 80-1350

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

COMMUNITY COMMUNICATIONS COMPANY, INC.,
Petitioner,

v.

CITY OF BOULDER, COLORADO,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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March 12, 1981

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTION PRESENTED

Is a Boulder City Ordinance, adopted pursuant to Colorado's unique constitutional home rule powers and imposing a 90-day moratorium on cable T.V. construction by the City's permittee, immune from antitrust attack as a governmental act?

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IN THE

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COMMUNITY COMMUNICATIONS COMPANY, INC.,
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CITY OF BOULDER, COLORADO,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Respondent City of Boulder, Colorado, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Tenth Circuit's decision in this case.

COUNTERSTATEMENT OF THE CASE

This case arises from governmental acts taken by the elected City Council of Boulder, Colorado, to promote competition and diversity in the cable television market in Boulder. Specifically at issue are City Ordinance Nos. 4472 and 4473[1], unanimously adopted by Boulder's nine-member City Council on December 18, 1979, which imposed a 90-day moratorium on new cable T.V. construction within the City limits by Petitioner,

[1] Reprinted in the Appendix to the Petition ("App. Pet.") at A-55 to A-65.

Community Communications Company, Inc. ("CCC"), pursuant to its City permit.[2]

Respondent is a "home rule" city under Article XX, Section 6 of the Colorado Constitution (App. Pet. at A-47 to A-49), which confers on the City "the full right of self-government in both local and municipal matters." In 1964, the City Council issued a permit with a term of 20 years to construct and operate a cable T.V. plant in Boulder. The permit was nonexclusive and, as required by Article II, Section 11 of the Colorado Constitution, revocable at any time at the will of the City Council. CCC purchased this permit, subject to its terms, in 1966. Until the spring of 1979, CCC's entire operation in Boulder consisted of the retransmission of certain Denver, Colorado and Cheyenne, Wyoming television signals to an area of the City that had historically experienced poor T.V. reception. CCC always has been the only cable T.V. operator in Boulder and, despite the City's efforts to induce competition, continues to enjoy a *de facto* monopoly.

In the spring of 1979, CCC announced plans to begin expansion of its system. (Boulder Ex. K).[3] At

[2] Petitioner CCC is a wholly-owned subsidiary of Tele-Communications, Inc. ("TCI"). TCI's 1978 Annual Report showed cable T.V. revenues of $55.5 million. TCI's General Manager, J. C. Sparkman, has testified that TCI has over 900,000 subscribers and is the third largest cable T.V. operator in the United States. *See* Sparkman, March 4 Tr. 112-13. Testimony at the hearing on the motion for preliminary injunction is referred to by the witness name, the date, and the page of the hearing transcript (*e.g.*, "Sparkman, March 4 Tr. _____" refers to the transcript for March 4, 1980); deposition testimony is referred to by witness name and page of deposition transcript (*e.g.*, "Westdyke Dep. _____"); and hearing exhibits are referred to as "TCI Ex. _____" or "Boulder Ex. _____."

[3] Contrary to CCC's suggestions, the City Council never made a "favorable response" to CCC's expansion plans. (Petition at 2 and

about the same time, Boulder Communications Company ("BCC"), co-defendant below, requested a permit to build a cable system in Boulder. In July 1979, prompted by these developments, the City Council launched a five-month study of the cable T.V. situation in Boulder.

The Council's study focused on means of achieving competition and, at study sessions held during the following months, there were repeated expressions of concern about the tendency of cable T.V. systems to become monopolies and about the advantage CCC enjoyed over prospective competitors because it was already in place in the City, had a substantial headstart in "wiring," and had already taken steps to expand.[4] The City Council feared that these factors would effec-

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2 n.1). On May 25, 1979, Richard Varnes, the Director of Media and Programming of the Boulder Public Library, wrote to CCC's local manager to express his appreciation for the announced plans to connect the library studio with the cable system and with the prospects of "distant signals" being added. (Boulder Ex. L).

[4] *See, e.g.*, Boulder Ex. X (transcript of July 31, 1979 City Council meeting) at 13-15, 19, 22-24, 37-38, 41-43; Boulder Ex. Y (transcript of November 29, 1979 City Council meeting) at 20-21, 26-30; Boulder Ex. Z (transcript of December 4, 1979 City Council meeting) at 5-6, 11, 16, 23-25.

CCC's suggestion that the City's cable T.V. consultant, Robert Sample, told the City Council that cable T.V. is not a monopoly and that competition is possible (Petition at 3 and 3 n.2) is a gross misstatement of record facts. In his comments at the City Council's July 31, 1979 meeting, Mr. Sample reiterated his belief that cable T.V. is a "natural monopoly," particularly in cities that have existing cable operators:

> Those communities that now have one franchise, now automatically have a natural monopoly. There is no possibility after a city is built for another operator to come in. . . . Economically, once you get one company all over town, I think it would be very, very difficult for another operator to come in. Nobody has proven that [it is possible] yet.

tively preclude the entry of additional cable T.V. operators into the Boulder market. (*E.g.*, Westdyke, March 4 Tr. 20, 96, 100).[5] During the course of the study, it became clear that the City could not achieve competition simply by issuing another permit. (*Id.* at 19).[6] Potential competitors would not enter the Boulder cable T.V. market while CCC was completing its system. (*Id.* at 35).

(Boulder Ex. X at 23). The language quoted by CCC is part of a sentence from Mr. Sample's discussion of the impact that changing technology and economics may have on competition in cable T.V.:

> *But we may be entering into a period where* if there are a couple of franchise holders, they may overbuild each other and compete for services. *I can't tell you right now if that's going to happen or not. It is going to be interesting to see.*

(*Id.* at 24). The italicized language was deleted in the selective quotation offered by CCC.

[5] During the fall, while the City Council was deliberating, CCC accelerated its construction schedule to capture more of the market before competitors could successfully enter. (Westdyke, March 4 Tr. 37). Richard Varnes testified in District Court that the president of CCC's parent company (TCI) told him on December 1, 1979, that the City's efforts to open competition "might make [CCC] build a little faster. . . . They would like to be the only show in town." (Varnes, March 6 Tr. 22).

[6] CCC correctly notes (Petition at 3) that the City had the legal authority to grant another non-exclusive permit to BCC. For the reasons stated in the text, however, the City Council was convinced that granting a permit would not bring competition to the Boulder cable market. Moreover, in late November, 1979, BCC told the Council that no cable operator would propose a system for Boulder so long as CCC continued to expand and suggested that CCC's permit be revoked and the most qualified applicant be selected to build a system in the City. (TCI Ex. 14). The record is also clear that the Council preferred not to deal with only one potential entrant and instead sought the broadest possible competition. (*See, e.g.*, Boulder Ex. X at 33).

Finally, on December 18, 1979, the City Council voted to impose a 90-day moratorium on cable T.V. construction.[7] The purpose of the moratorium was temporarily to halt CCC's wiring of Boulder so that the City could solicit proposals from other cable T.V. operators to compete with CCC. The City Council believed that so long as CCC continued to build its system, any efforts to attract prospective competitors would be futile. Subsequent events proved this belief to be well-founded.[8]

The First Injunction. On January 15, 1980, CCC announced that it would defy the City's moratorium and continue stringing cable in the City's rights-of-way.[9] On the same day, CCC brought this action in the federal District Court in Denver, seeking damages and injunctive

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[7] The Council rejected a staff recommendation that a six-month moratorium be imposed. (Boulder Ex. A-1 at 12).

[8] Shortly after adopting the moratorium Ordinances, the City began its attempts to induce competitors to come into the Boulder cable T.V. market. On January 11, 1980 the City mailed draft applications for cable permits to over 50 cable operators in the United States. (Westdyke, March 4 Tr. 43). The City also placed advertisements in the *Wall Street Journal.* (Varnes, March 6 Tr. 20). Only three cable operators (other than CCC) responded to the City's solicitation. Each of the three operators, including BCC, indicated, subsequent to filing its proposal, that it would not enter the market if CCC proceeded to "wire" the entire City. Their positions are a matter of record in the trial court and before the Tenth Circuit on the appeal still before that court in this action. (*See* 12-13, *infra*). (Boulder Ex. I-2d at 1098-1102, 1110-11).

[9] When CCC continued to string cable in defiance of the moratorium, the City issued citations to the crews, and then, acting pursuant to BOULDER, COLORADO, CODE §31-10 (1965 rev. ed.), which authorizes the removal of encroachments on the public rights-of-way, removed some of the cable installed in violation of the Ordinances. The record is devoid of evidence of the amount of cable that was removed or of evidence that it was "destroyed." (Petition at 4-5).

relief on the basis of eleven separate claims, including that: the City had conspired with co-defendant BCC in violation of Section 1 of the Sherman Act; the moratorium infringed CCC's First Amendment rights; and the City violated CCC's federal civil rights and various state law rights.

An evidentiary hearing on CCC's motion for a preliminary injunction was held on March 4-6, 1980. At the hearing, testimony was received from eight witnesses and portions of the transcripts of depositions of four City officials and two principals of BCC were received in evidence. The City's witnesses gave uncontroverted testimony about the harmful impact that CCC's existing and expanding cable T.V. operation had on potential competition.[10] Additional uncontroverted testimony described the cable T.V. market and the economic and physical reasons why CCC's wiring of the City threatened to foreclose any future competition and further entrench its *de facto* monopoly.[11]

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[10] The City's expert witness, Carl Pilnick, testified repeatedly that municipal cable T.V. service tends to be a monopoly (Pilnick, March 5 Tr. 96, 129, 132, 151, 166-67, 181, and 187) and added that:

> If it was too far gone, if the first company had so much of an advantage either in construction itself, or being ready for construction, then you could issue a thousand permits, and of the thousand the remaining 999 permittees would really have no practical chance of building an operating system.

(*Id.* at 45; *see also* Westdyke, March 4 Tr. 96, 100).

[11] The record establishes that cable operators do not generally compete against each other "head-to-head"; once a cable is in place, a second, competing line will probably not be installed. No more than 0.1% of the nation's cable systems (6 of 6000) involve competition in the same geographic areas. (Pilnick, March 5 Tr. 38-39, 42-44, 129, 132, 151; Sample, March 4 Tr. 218; Westdyke Dep. 34-39). The record further establishes that traditional cable

On March 17, 1980 — one day before expiration of the 90-day construction moratorium — the District Court enjoined the City "from taking any unilateral action to restrict, limit, or revoke the authority of [CCC] to conduct its cable television business. . . ." *Community Communications Co.* v. *City of Boulder,* 485 F. Supp. 1035, 1041 (D. Colo. 1980) (App. Pet. at A-36, A-46). The trial court found that CCC was unlikely to prove the antitrust conspiracy between the City and BCC, which it had alleged, and that the City's alleged restraint of trade was not *per se* illegal. (*Id.* at A-40, A-42). Having found no conspiracy and without undertaking the requisite economic analysis of the moratorium, the trial court nonetheless based its injunction upon a finding that the City had violated the antitrust laws:

> The [City's] motivation may be to foster competition in the long run, but the direct and immediate effect is a restraint of trade and an artificial and unreasonable geographical market allocation.

(*Id.* at A-43). The trial court rejected the City's claim that its enactment of the moratorium Ordinances was a governmental act exempt from the antitrust laws under *Parker* v. *Brown,* 317 U.S. 341 (1943), because, in the

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economics virtually insure a monopoly, since market penetration rates are not high enough to cover the capital and operating costs of two directly competing systems. (Pilnick, March 5 Tr. 37, 40, 44-46, 54-55). The principal physical barriers to head-to-head competition are the costs associated with the rearrangement of lines on utility poles which is necessary when a second cable T.V. is added and, in areas where cable must be laid underground, the problems associated with digging up roads and homeowners' property a second time and the inevitable extra costs associated with accidental cutting of the first underground cable. (*Id.* at 33-37, 41; Sample, March 4 Tr. 226; Olson, March 6 Tr. 58-63).

trial court's view, the moratorium and the City's efforts to negotiate permits were not a proper exercise of its authority under Colorado law:

> It might well be a different case if Boulder had enacted an ordinance articulating qualifying criteria for cable companies to do business in the City, with such other regulations as the City government might believe to be necessary and proper in the exercise of police power, and then to confront the contention that such an ordinance has an anticompetitive effect. That is not this case. Here, upon the present record, *Parker* v. *Brown* is wholly inapplicable and Boulder is subject to an antitrust liability under *City of Lafayette* v. *Louisiana Power & Light, supra* for the actions which it has taken.

(*Id.* at A-42).

The First Appeal. The City appealed this first injunction to the Tenth Circuit Court of Appeals, on the bases that: the City's actions were entitled to antitrust immunity under *Parker* v. *Brown*; there was no Sherman Act violation; and the injunction was overly broad since the moratorium at issue expired by its terms 24 hours thereafter. On May 28, 1980, the Court of Appeals reversed the preliminary injunction appealed from, holding that the challenged City Ordinances were immune from antitrust liability under the *Parker* doctrine. *Community Communications Co.* v. *City of Boulder,* 630 F.2d 704 (10th Cir. 1980) (reprinted at App. Pet. A-1).

The Court of Appeals focused first on the nature of Boulder's interest in cable T.V., finding that the City's method of regulating cable T.V. was not improper under Colorado law, nor did it "somehow eliminate the *Parker* v. *Brown* considerations," and that "[t]he City is not in the television business in any way, and . . . the action is

an exercise of governmental authority." (*Id.* at A-3, A-6 to A-7). The court also found that the City had adopted "a policy of fostering competition" in the Boulder cable T.V. market. (*Id.* at A-7). The court further found that the City's authority lay in the unique home rule provisions of Article XX, Section 6 of the Colorado Constitution, and concluded that: "The source of the authority of the City here is thus derived directly from the state constitution and is not a residual or delegated power." (*Id.* at A-5). Relying on Colorado law, the Court of Appeals noted that the Colorado Supreme Court has interpreted the constitutional grant of authority as conferring "complete authority" on "home rule cities in Colorado as to local matters" and that home rule cities can even supersede contrary state statutes as to matters of local concern. (*Id.* at A-5 to A-6). Finding that the matter at issue — CCC's permit to use Boulder's streets to provide cable T.V. service solely to Boulder residents — was a matter of local concern,[12] the court held that "the regulation of the business of cable T.V. is well within the power and authority of the City of Boulder." (*Id.* at A-7).

The Court of Appeals distinguished *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389 (1978), because, unlike Boulder, the cities there involved

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[12] The Court of Appeals interpreted the Colorado Constitution for purposes of determining the City's authority under state law and concluded that the City's regulation of the geographical areas in which a City permittee will be allowed to use the City's rights-of-way is obviously a legitimate matter of local concern:

> The franchise of the plantiff cable T.V. company is necessarily limited to service within the City of Boulder. The services provided are limited to City residents through the use of City streets and ways. The matter or subject is a local one.

(App. Pet. at A-6).

owned and operated an electric utility in direct competition with the antitrust claimant. The court further held that in any event the constitutional grant of home rule powers to Boulder satisfied both the requirement of the majority in *City of Lafayette* that immunity be conferred only where the local governmental act was "comprehended within the powers granted to it by the legislature. . . ," 435 U.S. at 394, and the requirement of the plurality that city actions be taken "pursuant to a state policy to displace competition with regulation. . . ," *id.* at 413. (App. Pet. at A-8).

Finally, the Tenth Circuit analyzed Boulder's moratorium Ordinances under the test set forth in this Court's most recent antitrust immunity decision, *California Retail Liquor Dealers Association* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). The Court of Appeals found that the *Midcal* test had been satisfied because the City, exercising sovereign powers granted directly by the Colorado Constitution to act on the "local matters" at issue, had adopted a policy that had been "affirmatively expressed" and actively supervised and enforced. (App. Pet. at A-8). The court concluded that "the trial court was in error as a matter of law as to the basis for issuance" of the injunction and accordingly reversed. (*Id.* at A-9).

On July 1, 1980, after CCC had filed a petition for rehearing, a dissenting opinion was filed.[13] Prior to ruling on the petition, the Court of Appeals ordered an

[13] (App. Pet. at A-10). The dissent argued that the moratorium violated CCC's First Amendment rights and that the preliminary injunction should have been sustained on that ground alone. (*Id.* at A-14 to A-23). Without discussing whether a Sherman Act violation had been established, the dissenting opinion also argued that the preliminary injunction should have been upheld because the City was not entitled to antitrust immunity. (*Id.* at A-24 to A-32).

additional round of briefs by all parties. Rehearing was denied on October 1, 1980.

The Second Injunction. Since the Tenth Circuit decided the first appeal, there have been additional proceedings below that are relevant to this Court's consideration of the Petition. Following the May 28 decision of the Court of Appeals, CCC renewed substantial, additional construction of its cable T.V. system throughout Boulder. In order to prevent CCC from completing its cable system and foreclosing any competition in the Boulder cable market, the City Council reimposed temporary construction moratoria for five additional weeks. On July 22, 1980, the City Council adopted a final Ordinance dividing the City into cable T.V. districts, effective August 22. The districting Ordinance was adopted only after the City Council reluctantly concluded that cable T.V. competition in the same geographic area was not feasible so long as CCC was building throughout the City. The new Ordinance restricted CCC to a district comprised of about one-third of the homes in Boulder (an area CCC has admitted is economically viable), in order to obtain one or more additional operators in the remaining two-thirds of the market.

CCC again moved for a preliminary injunction in this action and, on August 25, 1980, the District Court preliminarily enjoined enforcement of the City's districting Ordinance.[14] Virtually identical to the first injunction, the second injunction was based on antitrust (the court again having found the City not to be immune under *Parker*) and First Amendment grounds.

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[14] The District Court's decision appears at 496 F. Supp. 823 and is reprinted in the Appendix to this Brief.

The Second Appeal. On August 25, 1980, the City noticed an appeal from this second injunction.[15] As a result, again at issue before the Tenth Circuit is the question of the City's immunity from antitrust liability when it acts to promote competition and diversity by adopting Ordinances geographically restricting CCC's cable T.V. construction in Boulder. The City contends that the antitrust immunity issue has been resolved by the Tenth Circuit's earlier decision and that the injunction, to the extent it is based on antitrust grounds, must thus be overturned. CCC, on the other hand, contends that the trial court properly interpreted the earlier Tenth Circuit opinion as granting an antitrust exemption only for the City's adoption of a moratorium on cable construction. (Brief of Appellee in No. 80-1882 at 27-34). Also presented again is the question of whether there is an underlying Sherman Act violation.[16] In addition, complex questions of First Amendment law have been raised. This second appeal has been fully briefed and oral argument has been set for the week of May 11.[17]

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[15] Community Communications Co. v. City of Boulder, *appeal docketed*, No. 80-1882 (10th Cir.).

[16] Although the injunction was based on antitrust grounds, the trial court made no finding that the Sherman Act had been violated.

[17] It should be further noted that the trial court still retains jurisdiction of this action and, only recently, issued an order setting a hearing for March 12, 1981 to discuss the possible severance of claims and defendants for trial. Memorandum Opinion and Order, filed Feb. 9, 1981, in Community Communications Co. v. City of Boulder, No. 80-M-62 (D. Colo.).

REASONS WHY THE WRIT SHOULD BE DENIED

1. The Question Presented By This Petition Is Still Before The Tenth Circuit.

Because of the unusual status of the proceedings below, the very question presented by the Petition is still pending before the Tenth Circuit. Except in extraordinary circumstances, the writ should not be granted to review an issue which remains subject to review by the appellate court in the same action. No such extraordinary circumstances are present here. Moreover, the Petitioner has not even referred to the pendency of this second appeal which presents again the issue of Boulder's immunity from the antitrust laws in regulating locally permitted cable T.V. operations. CCC's failure to describe this important procedural setting "with accuracy," a matter which is obviously "essential to ready and adequate understanding of the points requiring consideration," violates Rule 21.5 of this Court and is alone sufficient reason for denying the Petition.[18]

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[18] CCC's silence on the subject is particularly significant because of the spectre of mootness raised by the second appeal. CCC has argued vehemently in the Tenth Circuit that the immunity issue decided on the first appeal is "far different" from that presented by the second appeal. (Brief of Appellee in No. 80-1882 at 27). If the issues are far different, then the antitrust immunity issue which is the subject of the petition for the writ is moot since the City's action to which it applied — a 90-day moratorium — has long since expired and the parties are now litigating over a "far different" cable T.V. districting Ordinance. The City contends in the second appeal that, for purposes of antitrust immunity analysis, the City's temporary moratorium Ordinances and permanent districting Ordinance are indistinguishable. The simple point is, however, that CCC may not play its contentions both ways. It may not maintain before this Court that the Tenth Circuit's decision "cries out for review" because of its widespread import (Petition at 30) and at the same time argue to the Tenth Circuit that its decision applies only to an expired City moratorium Ordinance. (Brief of Appellee in No. 80-1882 at 27, 29).

2. The Tenth Circuit Properly Applied The Antitrust Immunity Standards Established By This Court.

It is important to recognize at the outset that there is no dispute in this case that had the cable T.V. moratorium ordinances at issue here been adopted by the Colorado Legislature, they would be immune from antitrust attack as governmental acts. CCC (and the dissenting opinion below) contend that the governmental immunity ordinarily applicable in these circumstances dissolves solely because a moratorium on local construction, within particular areas of a particular city, was adopted by the home rule municipal government under powers derived directly from the State Constitution. The decision of the Tenth Circuit holding such a municipal governmental act to be immune is wholly consistent with the decisions of this Court.

a. The Tenth Circuit's decision is consistent with *Parker* v. *Brown* and its progeny.

In *Parker* v. *Brown*, this Court reversed an injunction entered against the State of California on antitrust grounds, holding that:

> The state in adopting and enforcing the prorate program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but, *as sovereign, imposed the restraint as an act of government* which the Sherman Act did not undertake to prohibit.

317 U.S. at 352 (citations omitted; emphasis added). The Tenth Circuit's analysis is consistent with that fundamental principle. The Court of Appeals found that, as to matters of local concern such as local cable T.V. permits, the Colorado Constitution and Colorado law vest the City of Boulder with sovereign powers. To

paraphrase language from this Court's decision in *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 360 (1977), in the present case the City of Boulder "is the ultimate body wielding the State's power" within its municipal boundaries "and, thus, the restraint 'is compelled by direction of the State acting as sovereign.' " The City's local action was a "sovereign . . . act of government," *Parker* v. *Brown*, 317 U.S. at 352, and, as such, properly entitled to antitrust immunity.[19] The Tenth Circuit's decision is also consistent with the other antitrust immunity decisions of this Court subsequent to *Parker* v. *Brown*.[20]

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[19] "Immunity" is a shorthand expression for *Parker*'s holding that Congress did not intend to reach such governmental acts under the Sherman Act. *City of Lafayette*, 435 U.S. at 393 n.8. Although the *Parker* doctrine is derived from concepts of federalism, there is an even firmer basis for exempting state and municipal actions. When a state or its political subdivision exercises one of its "attributes of sovereignty" and performs "functions essential to separate and independent existence," Constitutional limitations on the operation of federal laws come into play. *See* National League of Cities v. Usery, 426 U.S. 833, 845 (1976). The Chief Justice has expressly referred to this principle as an additional ground for antitrust immunity. *City of Lafayette*, 435 U.S. at 423.

[20] Of the six antitrust immunity cases decided by this Court since *Parker* v. *Brown*, three [Midcal, Cantor v. Detroit Edison Co., 428 U.S. 579 (1976), and Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975)] have involved attempts by private concerns — not governmental bodies — to shield themselves behind the antitrust immunity of a state government or its subsidiary. The instant case is distinguishable from those cases since here a unit of government seeks immunity, as was the case in *Parker* and two more recent decisions, New Motor Vehicle Board of California v. Orrin W. Fox Co., 439 U.S. 96 (1978), and *Bates*. In *Bates*, this Court concluded that *Cantor* would have been "an entirely different case if the [antitrust] claim had been directed against a public official or public agency, rather than against a private party." 433 U.S. at 361. Only in *City of Lafayette* has this Court held a governmental unit subject to liability under the antitrust laws. The Tenth Circuit properly distinguished this case from *City of Lafayette*, as is demonstrated at 19-21, *infra*.

b. The Tenth Circuit's decision is consistent with *City of Lafayette*.

In *City of Lafayette*, this Court concluded that although the *Parker* immunity is available for municipalities under certain circumstances, it was not available to immunize predatory market activities by a city-owned electric utility. By a 5-4 vote, the Court affirmed the Fifth Circuit's holding that the immunity would apply only if a city's actions " 'are comprehended within the powers granted to it by the legislature.' " 435 U.S. at 394. A plurality of the Court would have limited the *Parker* exemption for cities to acts which are "pursuant to state policy to displace competition with regulation or monopoly public service." 435 U.S. at 413. The Chief Justice concurred in the judgment on the basis that the state action exemption did not apply when a city's "business activity" made the case "an ordinary dispute among competitors in the same market." *Id.* at 418, 419. Four Justices dissented on the basis that the actions of the states and their political subdivisions are equally exempt under *Parker*. *Id.* at 426.

Boulder's moratorium Ordinances qualify for immunity under the tests set forth in *City of Lafayette* by the majority, the plurality, the Chief Justice's concurrence, and the dissent.[21] Contrary to Petitioner's claims,

[21] Commentators have noted that five members of the Court would apparently uphold the *Parker* v. *Brown* exemption even where the plurality's requirement is unfulfilled.

> Implicit in [the Chief Justice's] reasoning is the assumption that a municipality acting in a governmental capacity should be exempt from the antitrust laws. Thus, if a future case presents a "governmental" activity not authorized by the state, five members of the Court evidently would vote to exempt the municipality from the antitrust laws.

The Supreme Court, 1977 Term, 92 HARV. L. REV. 57, 281 (1978) (footnotes omitted).

the Tenth Circuit's decision is consistent with the majority[22] and plurality opinions. The majority opinion (Part I) quoted and apparently embraced the ruling below by the Fifth Circuit that would immunize the governmental acts of cities when it may be inferred "from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of." 435 U.S. at 394. Here the action complained of (a local construction moratorium) is plainly within the authority given the home rule City of Boulder and is contemplated by its constitutional grant of powers directly from the people.

Similarily, although the plurality reasoned that a city's actions would be exempt only if they were taken "pursuant to a state policy to displace competition with regulation," 435 U.S. at 413, the plurality further concluded that:

> This does not mean, however, that a political subdivision necessarily must be able to point to a specific, detailed legislative authorization before it properly may assert a *Parker* defense to an antitrust suit. . . . [W]e agree with the [Fifth Circuit] Court of Appeals that an adequate state mandate for anticompetitive activities of cities . . . exists when it is found "from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of."

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[22] CCC asserts that the decision below conflicts with the holding of the majority in *City of Lafayette*. As support for its claim, CCC offers eight lengthy quotations from *City of Lafayette* (Petition at 7-8, 20), but fails to disclose that seven of these quotations are taken from the plurality opinion and not from Part I of the opinion, which is the only part commanding the votes of five Justices.

Id. at 415. The plurality adopted the Fifth Circuit's view that "it is not necessary to point to an express statutory mandate for each act," that it is instead sufficient if the municipal acts "are comprehended within the powers granted to it by the legislature." *Id.* at 393-94. No talismanic legislative words are required and the " 'district judge's inquiry on this point should be broad enough to include all evidence which might show the scope of legislative intent.' "[23] *Id.* at 394.

The Tenth Circuit's decision is fully consistent with this approach. Although it distinguished the present case from *City of Lafayette* on the facts, it also applied the plurality's reasoning and found the requisite state policy in the Colorado Constitution's grant to Boulder of exclusive power over matters of local concern.[24] It is clear

[23] Petitioner and *amicus curiae* assert that since the Colorado Legislature has adopted no policy relating explicitly to cable T.V., and it has adopted an overall antitrust policy under Colorado's antitrust statute, then the home rule cities of the State are foreclosed from regulating cable T.V. in any manner which conflicts with the State antitrust law. (Petition at 26, 29; *Amicus Curiae* Brief at 15). This attempt to divine a restrictive legislative intent is wholly without merit. Colorado home rule cities have been prominently regulating cable T.V. for almost 20 years (since 1964 in the case of Boulder) and, in some home rule cities such regulation has even fixed the prices for local, monopoly cable T.V. service [*e.g.*, Manor Vail Condominium Association v. Town of Vail, _____ Colo. _____, 604 P.2d 1168 (1980)]. The State Legislature has acquiesced in this regulation and at no time during this long period has the Legislature attempted to bar such local regulation. Moreover, in *Manor Vail*, the Colorado Supreme Court implicitly acknowledged the power of home rule cities even to fix the prices for monopoly cable T.V. service. *See* discussion at 25 n.37, *infra*.

[24] The Tenth Circuit's analysis is also consistent with recent decisions of the Third and Fifth Circuits which have held that express state authorization is unnecessary since the authority for the actions of a state instrumentality " 'may be inferred from the nature of

from the powers and duties given to the home rule City of Boulder that the local acts here at issue were "comprehended within the powers granted to it" (435 U.S. at 394) by the people of Colorado, the grantors of those powers.[25]

c. The Tenth Circuit properly distinguished *City of Lafayette* on the facts.

A majority of this Court held in *City of Lafayette* that although cities may in certain circumstances be immune from the antitrust laws, the cities of Lafayette and Plaquemine, Louisiana, were not entitled to immunity on the facts of that case. The Chief Justice's concurring opinion makes it clear that he denied the cities immunity because they were " 'engaging in what is clearly a business activity; activity in which a profit is realized' " (435 U.S. at 418) and because the case presented "an ordinary dispute among competitors in the same market."

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the powers and duties given to a particular government entity. . . .' " Feminist Women's Health Center, Inc. v. Mohammad, 586 F.2d 530, 550 (5th Cir. 1978), *cert. denied*, 444 U.S. 924 (1979); Princeton Community Phone Book, Inc. v. Bate, 582 F.2d 706, 717 (3d Cir.), *cert. denied*, 439 U.S. 966 (1978).

[25] CCC contends that: "Colorado's Home Rule Amendment contemplates neither the kind of act at issue here, revocation of cable permit by enactment of municipal ordinances, nor the anticompetitive effects of such act. . . ." (Petition at 28). Thus, CCC asserts that the City is without power to revoke a cable T.V. permit. This contention is flatly wrong under Colorado law and leads to an absurd result. It is wrong on the law because Section 115 of the Boulder City Charter and Article II, Section 11 of the Colorado Constitution both require that all municipal permits and franchises be revocable at will by the City Council. It leads to an absurd result because, on CCC's analysis, if the home rule amendment does not contemplate revocation of a cable permit, then *a fortiori* it could not contemplate the granting of such a permit in the first place.

Id. at 419. It is equally clear from a review of the plurality opinion that the potential impact of cities' "economic choices," made "in the conduct of their business affairs" without antitrust liability, was a determining factor in that opinion.[26] Another factor taken into account by the Court was the highly predatory conduct, including patently illegal tie-ins, for which the cities sought antitrust immunity. *Id.* at 403-05, 405 n.31.

The Tenth Circuit distinguished the present case from *City of Lafayette* on the basis of the differences in the facts. The court reasoned that Boulder was entitled to immunity where the Louisiana cities were not because Boulder, unlike Lafayette and Plaquemine, was not acting as an "owner or provider of services" (435 U.S. at 408) and because Boulder's dispute with CCC is not simply "one among competitors in the same market." 435 U.S. at 419.[27] The Tenth Circuit properly found that

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[26] [T]he economic choices made by public corporations in the conduct of their business affairs . . . are not inherently more likely to comport with the broader interests of national economic well-being than are those of private corporations. . . .

435 U.S. at 403.

When these bodies [municipalities] act as owners and providers of services, they are fully capable of aggrandizing other economic units with which they interrelate. . . .

435 U.S. at 408.

[27] The Tenth Circuit characterized the Louisiana cities' actions as "proprietary" to distinguish them from Boulder's governmental acts. (App. Pet. at A-6 to A-7). This distinction is used by the Chief Justice in his concurring opinion in *City of Lafayette*: "I use the term 'proprietary' only to focus attention on the fact that all of the parties are in a competitive relationship. . . ." 435 U.S. at 422 n.3. CCC's hornbook and state law definitions drawn from other contexts for other purposes are irrelevant; as used by the Tenth Circuit the term has reference to a municipality's business activities in competition with private enterprises.

"[t]he City is not in the television business in any way. . . ." (App. Pet. at A-6 to A-7). Neither has Boulder engaged in any of the pernicious trade restraints that the Louisiana cities were alleged to have committed. Enactment of the Boulder City moratorium Ordinances was not the act of one competing in the marketplace. Boulder was engaged solely in governmental acts regulating cable T.V. within the City's boundaries. The Tenth Circuit properly concluded that this Court's denial of antitrust immunity in *City of Lafayette* was based on facts not applicable to the City of Boulder.

3. The Tenth Circuit's Decision Does Not Conflict With Decisions Of Other Circuits.

Petitioner CCC and *amicus curiae* apparently agree that there is no conflict among the federal courts of appeals on the "same matter" presented here which would justify granting the writ. *See* Sup. Ct. R. 17.1(a); *Amicus Curiae* Brief at 8 n.8. The City also agrees that there are no federal court of appeals decisions on the same matter, much less in conflict with the decision subject to the present Petition. Moreover, the absence of such appellate court decisions seriously undermines CCC's claim that the state immunity question decided below presents issues of urgent, nationwide significance.

Amicus curiae contends, however, that recent decisions of a few federal district courts are in conflict over the antitrust immunity accorded the City of Boulder by the Tenth Circuit. *See Amicus Curiae* Brief at 5-8. The district court decisions relied on by *amicus* are not in

direct conflict with each other[28] or with the Tenth Circuit's ruling.[29] In any event, the two district court opinions on which *amicus* places greatest reliance are now on appeal in the Sixth and Tenth Circuits.[30] This Court should not exercise its discretion to grant the writ in this case on the basis of the results in district court decisions until the antitrust immunity issues in those cases have been fully ventilated and decided by the courts of appeals which now have those matters before them.

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[28] In Pueblo Aircraft Service, Inc. v. City of Pueblo, 498 F. Supp. 1205 (D. Colo.), *appeal docketed*, No. 80-2083 (10th Cir. Oct. 16, 1980), and Glenwillow Landfill, Inc. v. City of Akron, 485 F. Supp. 671 (N.D. Ohio 1979), *appeal docketed sub nom.* Hybrid Equipment Corp. v. City of Akron, No. 80-3121 (6th Cir. Jan. 14, 1980), the district courts upheld municipal antitrust immunity on the basis of constitutional grants of municipal authority. By contrast, the district courts in Cedar-Riverside Associates, Inc. v. United States, 459 F. Supp. 1290 (D. Minn. 1978), *aff'd on other grounds sub nom.* Cedar-Riverside Associates, Inc. v. City of Minneapolis, 606 F.2d 254 (8th Cir. 1979), and Woolen v. Surtran Taxicabs, Inc., 461 F.Supp. 1025 (N.D. Tex. 1978), rejected antitrust immunity for certain subordinate actions of cities empowered only by statutory home rule provisions.

[29] The *amicus* contends that the immunity issue presented here is indistinguishable from that presented in Woolen v. Surtran Taxicabs, Inc., 461 F. Supp. 1025, 1031 (N.D. Tex. 1978), where the District Court rejected the *Parker* exemption claimed by four Texas cities in a suit challenging their operation of the Dallas-Fort Worth Airport. The *Woolen* decision is distinguishable from Boulder's case, and the court below so distinguished it (March 6 Tr. 121-25) because Colorado home rule powers are much broader than those conferred in Texas. Moreover, the case is further distinguishable because, unlike the situation in Colorado, a Texas statute directly regulating the challenged city action (operating an airport) expressly denied the cities authority to violate the federal antitrust laws.

[30] These are the *Glenwillow Landfill* and *Pueblo Aircraft* cases discussed at n.28, *supra; Amicus Curiae* Brief at 5-6.

4. The Tenth Circuit's Decision Is Dependent Upon Controlling And Unusual Issues Of State Law Which Limit Its Scope And Application.

Boulder's immunity from antitrust liability is based upon what the trial court (March 6 Tr. 123) and the Court of Appeals (App. Pet. at A-4 to A-6) found were unique home rule powers under the Colorado Constitution. As the Court of Appeals concluded:

> The trial court said during the hearing as to authority for the City of Boulder:
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> > "THE COURT: If you get down to the ultimate source of power, and governmental concepts, Boulder is exercising authority of the people of the state of Colorado in matters of local concern within Boulder, because the people of the state of Colorado exercising their ultimate sovereign power put Article 20 in the Constitution of this state. They are not operating under some delegated authority from the representatives in the general assembly. That's what Colorado's Article 20 is all about."
>
> The source of the authority of the City here is thus derived directly from the state constitution and is not a residual or delegated power. See the references in *City and County of Denver* v. *Henry*, 95 Colo. 582, 38 P.2d 895, to the situations where an ordinance may even supersede a state statute as to matters of purely local concern. *See also Service Oil Co.* v. *Rhodus*, 179 Colo. 335, 500 P.2d 807, and *Davis* v. *City and County of Denver*, 140 Colo. 30, 342 P.2d 674.

(App. Pet. at A-4 to A-6). The fundamental factors which render Colorado's home rule powers unique are its source — the people of the State of Colorado through the Colorado Constitution — and its scope —

exclusive authority as to matters of local concern. *See Four County Metropolitan Capital Improvements District* v. *Board of County Commissioners*, 149 Colo. 284, 369 P.2d 67 (1962). These factors necessarily preclude the application of Boulder's antitrust immunity to the other states which comprise the Tenth Circuit's jurisdiction. Although home rule cities in Oklahoma and New Mexico derive their authority from self-executing constitutional provisions[31], the autonomy of home rule cities in both states is restricted and subject to control by the legislatures.[32] In the other Tenth Circuit jurisdictions, Wyoming, Utah and Kansas, home rule cities have even less autonomy since they may not operate until their respective legislatures have adopted enabling legislation.[33]

The ruling of the Tenth Circuit has no direct application beyond the jurisdictional boundaries of that Circuit. Furthermore, Colorado's constitutional home rule provisions are distinguishable from each of the 34 other states which have constitutional provisions for city home rule. Fourteen of the states have mandatory provisions requiring enabling legislation;[34] eleven other states

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[31] N.M. CONST. art. X, §6; OKLA. CONST. art. XVIII, §3.

[32] N.M. CONST. art. X, §36, provides that " [a] municipality which adopts a charter may exercise all legislative powers and *perform all functions not expressly denied by general law or charter.*" (Emphasis added). In Oklahoma, a statute grants supremacy over conflicting state laws to charters but not ordinances of home rule cities. OKLA. STAT. ANN. tit. 11, §13-109.

[33] WYO. CONST. art. XIII, §1; UTAH CONST. art XI, §5; KAN. CONST. art. XII, §5.

[34] ALAS. CONST. art. X; CAL. CONST. art. XI, §§3, 5-7; ME. CONST. art. VIII-A; MICH. CONST. art. VII, §22; MONT. CONST. art. XI, §§5-6; N.Y. CONST. art. IX; N.D. CONST. art. VII, §1; OHIO CONST. art. XVIII; PA. CONST. art. IX, §2; S.C. CONST. art. VIII, §11; TENN. CONST. art. IX, §9; WASH. CONST. art. XI, §10; W.VA. CONST. art. VI, §39(a); WIS. CONST. art. XI, §3.

have permissive provisions which allow state legislatures to delegate or withhold power to home rule cities;[35] nine states have self-executing provisions similar to Colorado's, but none share with Colorado the exclusive power over local matters conferred by the Colorado Constitution.[36]

The immunity conferred by the Tenth Circuit decision is limited not only by the type of authority exercised by the home rule city but also by the manner in which such authority is exercised. The Tenth Circuit decision makes clear that immunity extends only to the city's governmental actions pertaining to matters of local concern where the city is constitutionally entitled to act.[37]

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[35] CONN. CONST. art. X; FLA. CONST. art. VIII, §2; GA. CONST. art. IX, §111, Ch. 2-60; HAW. CONST. art. VIII, §2; IDAHO CONST. art. XII, §2; IOWA CONST. art. III, §38A; MINN. CONST. art. XII; MO. CONST. art. VI, §19; NEV. CONST. art. VIII, §8; N.H. CONST. pt. I, art. XXXIX; ORE. CONST. art. XI, §2.

[36] ARIZ. CONST. art. XIII, §§2-3; ILL. CONST. art. VII, §6; LA. CONST. art. VI, §§5-6; MD. CONST. art. XI-E; MASS. CONST. art. II; NEB. CONST. art. XI, §§2-5; R.I. CONST. art. XXVIII; S.D. CONST. art. IX, §2; TEX. CONST. art. XI, §5.

[37] (App. Pet. at A-7, A-8). The authority of Colorado home rule cities to regulate cable T.V. has recently been acknowledged by the Colorado Supreme Court in a decision upon which the Tenth Circuit relied in rendering its judgment in the present case. *See* the Tenth Circuit's discussion of Manor Vail Condominium Ass'n v. Town of Vail, _____ Colo. _____, 604 P.2d 1168 (1980), cited at App. Pet. A-3 to A-4. The *Manor Vail* case is also significant because the position Petitioner took in that case on the issue of home rule cities' powers over local cable T.V. operations contrasts so vividly with its position before this Court. In the trial court proceeding in *Manor Vail*, the executive vice president of CCC's parent company, TCI, had testified at length in support of the validity of the home rule city of Vail's ordinance fixing prices for cable T.V. services offered in Vail by a TCI subsidiary. (Transcript of July 6-8, 1976 Hearing in Fifth Judicial District of Colorado

Actions by a city which is in competition in the marketplace, as were the municipalities in *City of Lafayette*, are not immune under the Tenth Circuit's decision. Equally unprotected are private persons who conspire with a city or with whom a city acquiesces in a private conspiracy, as in *Cantor* or *Goldfarb*.

No general rules or categories of immunity are established by the Tenth Circuit's decision. Rather, the decision demonstrates the need for case-by-case analysis. As the majority in *City of Lafayette* concluded, in adopting the Fifth Circuit's ruling:

> Whether a governmental body's actions are comprehended within the powers granted it by the legislature is, of course, a determination which can be made only under the specific facts in each case.

435 U.S. at 394. The Tenth Circuit made precisely this kind of case-by-case analysis and based its antitrust immunity decision upon the specific facts and upon the distinguishing features that the immunity was asserted by the governmental entity itself, the action in question was a peculiarly local governmental regulation, and the action was adopted pursuant to the unique home rule powers conferred by the Colorado Constitution. These circumstances narrow the scope of the immunity and significantly limit its applicability to other cities and contexts.

(Civ. Action No. 2260) at 239-84). TCI also defended Vail's price-fixing ordinance on the ground that it "represents the legitimate and valid exercise by the Town of its power to grant a franchise to [the TCI subsidiary]" and that cable T.V. is "a private business affected with the public interest." (Answer of Community Television Investment, Inc. at 3-4). In the present case, when the challenged City regulations, by stimulating competition, threaten CCC's objective to "be the only show in town" (Varnes March 6 Tr. 22), Petitioner claims that the City of Boulder is without authority to regulate cable T.V. The Tenth Circuit expressly noted Petitioner's chameleon-like approach to this crucial issue. (App. Pet. at A-4).

5. The Tenth Circuit's Judgment Is Supportable On Additional Grounds.

This case is unlike other antitrust immunity decisions of this Court in which underlying and even *per se* violations of the Sherman Act were evident.[38] In this case, there is no antitrust violation at all, let alone a *per se* violation. When the conspiracy alleged in the complaint was found not to exist (App. Pet. at A-40), a new theory of conspiracy was created out of a whole cloth on the basis of an inapposite analogy.[39] Moreover, a governmental authority's imposition of a temporary construction moratorium on a monopoly supplier of services does not fall into any of the established categories of *per se* violations[40] and does not constitute an unreasonable

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[38] *See, e.g.*, California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97 (1980) (price fixing); City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978) (tying); Cantor v. Detroit Edison Co., 428 U.S. 579 (1976) (tying); Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) (price fixing).

[39] The trial court drew an analogy to a line of cases in which suppliers tried to force distributors into complying with an underlying illegal agreement. (App. Pet. at A-43). *See, e.g.*, Sahm v. V-1 Oil Co., 402 F.2d 69 (10th Cir. 1968), in which a "conspiracy" was found between a supplier and its distributor where the supplier used its contractual power to terminate in an attempt to make the distributor continue to comply with a *per se* illegal resale price maintenance agreement. *Sahm* and like cases are inapplicable here because (1) there is no underlying illegal contract, (2) the challenged activity was not an attempt to enforce such a contract, (3) CCC never complied with the moratorium, and (4) there is no evidence that the moratorium was intended as a punishment to CCC. Moreover, the analogy to *Sahm* is faulty from a factual point of view; the City and CCC are not in a commercial relationship such as that between manufacturer and distributor.

[40] The *per se* violations, cataloged in Northern Pacific R. Co. v. United States, 356 U.S. 1, 5 (1958), consist of price fixing, resale price maintenance, market allocations among competitors, and

restraint of trade under traditional Rule of Reason standards.[41] Although the Tenth Circuit did not reach the question since its decision rested on antitrust immunity grounds, the record demonstrates that the District Court erred as to matters of law in basing its injunction on alleged Sherman Act violations.[42] This Court should not exercise its discretion to review a question of antitrust immunity — a question of potential Constitutional dimensions — where it is clear that no antitrust violation has occurred.

In addition, the Tenth Circuit's judgment reversing the trial court's preliminary injunction must be affirmed in any event because the trial court committed other errors in issuing the injunction. The trial court broadly enjoined all future action by the City on the basis of a 90-day moratorium which expired the next day without finding a "reasonable likelihood of further violation in

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tying agreements. Vertical territorial allocations, to which the trial court inaptly analogized the relationship between the City and CCC, are not *per se* violations. Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977).

[41] Despite the District Court's explicit rejection of *per se* rules, it failed to conduct the rigorous analysis of the competitive impact of the challenged activity mandated by the Rule of Reason. National Society of Professional Engineers v. United States, 435 U.S. 679, 687-92 (1978); Board of Trade of the City of Chicago v. United States, 246 U.S. 231, 238-41 (1918). Its analysis is remarkably akin to a *per se* approach, consisting solely of an insupportable conclusion that competition in cable T.V. is possible (App. Pet. at A-43) and a bald statement that the moratorium effected "a restraint of trade and an artificial and geographical market allocation." (*Id.*).

[42] Although *amicus curiae* vigorously maintains that the City should not be immune from the antitrust laws, it has argued equally vigorously below, through *amicus* briefs filed by the State Attorney General with the trial court and with the Tenth Circuit, that the City has not violated the antitrust laws and that the immunity issue need not have been reached.

the future." *SEC* v. *Commonwealth Chemical Securities, Inc.*, 574 F.2d 90, 99 (2d Cir. 1978). The courts have denied injunctions in antitrust cases where the plaintiff has failed to prove a likelihood of future violations or ongoing harm from a past violation. *See, e.g., United States* v. *Parke, Davis Co.* 365 U.S. 125, 126 (1961) (*per curiam*); *In re Multidistrict Vehicle Air Pollution*, 538 F.2d 231, 236 (9th Cir. 1976). In the present action, the trial court made no finding whatsoever that future antitrust violations were likely or were threatened to occur. Indeed, the record firmly belies any such finding since, in the words of the trial court, "[i]t is inappropriate to ascribe any illegal or improper intent to action which has not yet been taken. . . ." (App. Pet. at A-44).

Finally, the Tenth Circuit's judgment reversing the trial court's injunction must be affirmed because the injunction was based upon the erroneous holding that an antitrust plaintiff need show no injury at all, much less irreparable injury, in order to obtain an injunction:

> THE COURT: Let me clear that up. If I reached a conclusion that the moratorium violates the antitrust laws, damage doesn't make much difference, because I am going to enjoin a violation of the antitrust laws whether that involves great and irrevocable damage or not. . . .

(March 6 Tr. 138). This ruling compels reversal because it is directly contrary to the governing statute, Section 16 of the Clayton Act (15 U.S.C. §26), which provides for injunctive relief in antitrust cases:

> [W]hen and under the same conditions and principles as injunctive relief . . . is granted by courts of equity, . . . and upon . . . a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue.

Proof of irreparable injury, or the threat that it will occur in the future is an essential prerequisite to injunctive relief. *Id.*; *SCM Corp.* v. *Xerox Corp.*, 507 F.2d 358, 363 (2d Cir. 1974); *Hardin* v. *Houston Chronicle Publishing Co.*, 426 F. Supp. 1114 (S.D. Tex. 1977), *aff'd*, 572 F.2d 1106 (5th Cir. 1978). In the instant case, the record demonstrates that CCC made no such showing.

This Court should refrain from granting the writ to review the broader issue of antitrust immunity where the judgment of the Court of Appeals is fully supportable on other grounds.

CONCLUSION

For all of the foregoing reasons, Respondent City of Boulder prays that the writ of certiorari be denied.

Respectfully submitted,

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March 12, 1981

APPENDIX

UNITED STATES DISTRICT COURT,
DISTRICT OF COLORADO

COMMUNITY COMMUNICATIONS COMPANY, INC., *Plaintiff,*

v.

CITY OF BOULDER *et al., Defendants.*

Civ. A. No. 80-M-62

September 5, 1980

MEMORANDUM OPINION AND ORDER

MATSCH, District Judge.

For a second time I have found it necessary to use the power of a preliminary injunction to protect Community Communications Company, Inc. (CCC) from irrevocable injury pending the final resolution of the dispute between the plaintiff and the City of Boulder. In an earlier Memorandum Opinion and Order, entered on March 17, 1980, and reported as *Community Communications Company, Inc.* v. *City of Boulder*, 485 F.Supp. 1035 (D.Colo. 1980) I described the circumstances giving cause for the complaint which first brought the parties into this Court. As there indicated, on December 19, 1979 the Boulder City Council passed an emergency ordinance which restricted the rights granted in a 1964 ordinance by prohibiting CCC from extending service to new customers for three months. The purpose of that moratorium was to limit the growth of the business of CCC while the City sought to negotiate with CCC, and other companies, for a new contract to service the City's residents in a manner which the City Council might consider appropriate. In the view of the City Council the presence of CCC operating a community antennae service in a small area of the city created such a threat of a monopolistic advantage as to require that restriction to permit other companies to come in with competing proposals.

In issuing that first injunction, I recognized that the period of limitation was about to expire without accomplishment of the City's objectives and that the very fluid facts of the case were still developing. Accordingly, while I decided that the antitrust implications controlled the question of a preliminary order, I also sought to caution the City about the possibilities of First Amendment involvement and other questions of possible constitutional concern.

The moratorium had already expired when the City's appeal of that injunctive order was argued to a three-judge panel of the Tenth Circuit Court of Appeals. Acting entirely on its own motion, and without any explanation, that panel went beyond the moratorium ordinance and entered its own order preventing CCC from expanding its service area until further order of the appellate court. On May 28, 1980, an opinion for two judges of the panel was filed, directing the reversal of my order, remanding the case, and terminating the stay order. It was further noted that Judge Markey[1] would be submitting a separate opinion.

He filed a vigorous dissent on July 1, 1980. On that same day, the Boulder City Council took new action against the plaintiff by passing Ordinance No. 4515 on first reading. The Council had earlier enacted emergency ordinances on June 3 and June 24, providing for additional periods of temporary restrictions of the plaintiff's expansion plans while the Council attempted to determine its position on the future of cable television in that community. I denied new motions for temporary restraining orders during that time, to enable the Boulder City Council to go forward with its legislative process. A motion for reconsideration filed in the Court of Appeals by CCC on June 25, 1980 has not yet been determined. Accordingly, I have not yet received a mandate from the Court of Appeals.

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[1] Honorable Howard T. Markey, Chief Judge, United States Court of Customs and Patent Appeals, sitting by designation.

The questions presented by Ordinance No. 4515 are far different from what was before me earlier and now before the Court of Appeals. Because time is a critical element, it has been necessary to go forward on the plaintiff's amended complaint and second motion for preliminary injunction without waiting for further action by the appellate court. Additionally, the City also filed its own motion for a preliminary order to prevent the plaintiff from violating the restrictions of the new ordinance.

Before turning to the questions presented, it is appropriate again to recognize that the case is not yet presented on the merits. While the evidence before me is extensive, and while the City has presented what purports to be the complete legislative record, I do not now know what further proof the plaintiff may submit to establish conspiratorial conduct among the named defendants.

Ordinance No. 4515, finally adopted on July 22, 1980, with an effective date of August 21, 1980, places a permanent geographic limitation on the plaintiff's pre-existing contract right to establish and operate a cable television communications system throughout the City of Boulder. More particularly, that right has now been reduced to a permission to provide service to a prescribed area encompassing only one-third of the City's residents. That area includes the portion of the city in which CCC has historically functioned as a community antennae system, plus the area it had expanded into prior to July 1, 1980.

The impasse which has developed between CCC and Boulder must be broken by granting one of their motions for a preliminary injunction. Thus, either the plaintiff must be prohibited from violating or the City must be prevented from enforcing Ordinance No. 4515. Recognizing the complexity of the legal issues and the absence of controlling precedent, and appropriate analysis should begin with a comparison of the competing claims of irreparable injury in the absence of injunctive relief.

The City's claim is that it is seeking advanced, state-of-the-art communications services for its citizens and that while other companies have expressed an interest in providing such services on terms to be negotiated, all of them have declined to proceed unless CCC is excluded from the market area. Thus, it is argued that unless the plaintiff is prohibited from expanding into the area to be made available to other companies, the negotiating process will be seriously disrupted.

Conversely, CCC contends that the City's revocation of the right to conduct business in two-thirds of the city, simply to benefit other companies, constitutes an unlawful restraint of trade in violation of Section 1 of the Sherman Act; that it infringes rights protected by the First Amendment; that it denies equal protection of the law; that it constitutes an inverse condemnation of the plaintiff's property; and that it otherwise is an unconstitutional infringement of contractual and property rights.

The test for whether irreparable injury exists, requiring the equitable remedy of injunction, is the inadequacy of the recognized legal remedy if the party seeking the preliminary injunction ultimately prevails. In this case, with conflicting claims of such irreparable injury, the question becomes one of the comparative capacity of the Court to right the wrong to the party who finally wins on the merits.

If enforcement of the ordinance is now enjoined, but the City's position is later determined to be correct, the only apparent loss is the time it may take to complete the negotiating process with other companies, free from the inhibiting influences of the plaintiff's market position and this lawsuit. The mere stringing of cables is not a significant concern because this Court obviously has the authority to require the plaintiff to remove those cables and to make any necessary adjustments with customers who are later determined to be outside of CCC's authorized service area.

Alternatively, if the plaintiff is compelled to abide by an ordinance which is later invalidated, the foreseeable injuries

may, by their very nature, be irreversible. To the extent that First Amendment rights are infringed, irreparable injury is presumed. *Elrod* v. *Burns,* 427 U.S. 347, 373, 96 S.Ct. 2673, 2689, 49 L.Ed.2d 547 (1976) (Brennan, J.); *Westinghouse Broadcasting Co.* v. *Dukakis,* 409 F.Supp. 895 (D.Mass. 1976); *Borreca* v. *Fasi,* 369 F.Supp. 906 (D.Haw.1974). Similarly, injunctions are often granted in favor of private antitrust plaintiffs when there is a threat of injury and the prevailing public interest in competitive market conditions will be served. *Zenith Corp.* v. *Hazeltine,* 395 U.S. 100, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969).

Finally, in considering the public interest, there is the apparent difficulty of measuring the plaintiff's economic loss in money damages coupled with the devastating impact of a large judgment on the defendant municipality and its citizens. And there should be concern for those persons who may want to subscribe to the services provided by CCC while this case is pending. (Exhibit I-2e, pp. 1540-42). Accordingly, it is my judgment that the relative risks of irreversible injury to the parties, as well as the public interest, compel the conclusion that enforcement of the ordinance must now be enjoined.

The questions of law which are presented in this case are difficult and novel. In ruling on a motion for a preliminary injunction, the probabilities of final success on the merits must be considered; but "it is not necessary that the plaintiff's right to a final decision, after a trial, be absolutely certain. *** (I)t will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberate investigation." *Continental Oil Co.* v. *Frontier Refining Co.,* 338 F.2d 780, 781-82 (10th Cir. 1964). There is no doubt in this case that plaintiff has met such a standard and is entitled to injunctive relief from enforcement of the new ordinance.

The facts now before me are markedly different from those involved in the preliminary injunction which is now on appeal. We are no longer concerned with the adverse effects

of a temporary interruption of the plaintiff's business. There has now been a unilateral revocation of its right to reach the major portion of the Boulder market for purposes which are questionable, considering the constitutional principle of limiting government to delegated powers.

The stated reason for the revocation is to create side-by-side competition so that different cable companies are "exposed to review and comparison" (Exhibit I-2e, p. 1524), the ultimate objective being to obtain a permittee promising the most advanced programming and communications services. Since the record shows that CCC has in fact "offered" what appears to be a state-of-the-art system through its response to the application process in February, 1980 (Exhibit I-2c, pp. 965-1095), a fair inference is that its fault is not a failure to "offer" such service for consumers, but a refusal to be contractually bound to provide programming subject to the approval of the City's government. Throughout the 1979 study sessions there are such comments as: ". . . you may be able to extract some additional concessions in terms of either their contribution or their local programming commitment" and: ". . . this is what we want if you're going to do anything in this community." (Exhibit I-2a, pp. 39, 54). A status report by the library director was critical of the present permit because it "offers no guarantees" that expanded programming will occur. (Exhibit I-2a, p. 89).

The City Attorney's position in 1979 was that a Boulder franchise "should include reservation of channels and reservation of some responsibility for determining both programming as well as simply channel-by-channel programming by the cable company" (Exhibit I-2a, p. 114), and his position now continues to be that the plaintiff's proposal in February of 1980, though it outlines a sophisticated and wide-range system, offers the City "virtually nothing" because the programming is not made mandatory (Exhibit I-2e, p. 1550).

As currently presented, the policy of the City Council is much different from the stated objective of the moratorium, which was merely solicitation of interest by other companies in the Boulder market. Permanent districting imposes rigid control over natural market forces, raising obvious antitrust concerns which would not be removed even if Chief Judge Seth's opinion becomes the law of this case.

Immunity from antitrust laws is granted only for governmental action which meets the requirements set out by the Supreme Court in *California Retail Liquor Dealers Association* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980). Thus, the actions must be governmental in nature and they must be taken pursuant to a clearly articulated and affirmatively expressed policy. Additionally, the governmental entity must actively supervise the implementation of that policy by comprehensive regulation, monitoring of conditions, and pointed re-examination of the process. In Judge Seth's opinion, a home rule city in Colorado can claim immunity for a temporary moratorium imposed to foster competition for obtaining a franchise because the Colorado Supreme Court impliedly recognized a municipality's authority to impose rate regulations in a cable system that operates by franchise. *Manor Vail* v. *Town of Vail*, 604 P.2d 1168 (Colo. 1980).

The permanent exclusion of plaintiff from two-thirds of the City, under a policy requiring continual supervision of what is being offered in terms of programming and communications services, is a much different action with more far-reaching consequences. The initial issue is whether the stated purposes for the exclusion indicate a proprietary rather than a governmental interest. Rather than simply fostering proposals from other companies on a non-exclusive basis, the City now must establish a system of regulation that oversees the "quantity and quality" of cable communications and perhaps dictates certain results through contract negotiations. Essentially, through the mechanisms required by *Midcal*, the City must take control of the future of cable television in Boulder in a manner which is actually proprietary.

While rate regulation in Vail or the solicitation of proposals for permits in Boulder may be considered matters of such local concern as to justify the exercise of sovereign authority by a home rule city, it is certainly doubtful whether control over the quantity and quality of communications can be so characterized. Indeed, the City has relied heavily on FCC cases to justify its conduct here; i.e., *FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775, 98 S.Ct. 2096, 56 L.Ed.2d 297 (1978), without acknowledging the difference between the authority which the United States Congress has delegated to the FCC to patrol the public airways and the parochial interests of the Boulder City Council in protecting the city's streets and alleys. Moreover, the FCC itself has reduced its regulation over cable television because of its unsettled state of development and the differences between cable and the broadcast system. *Brookhaven Cable TV, Inc.* v. *Kelly*, 573 F.2d 765 (2d Cir. 1978), *cert. denied* 441 U.S. 904, 99 S.Ct. 1991, 60 L.Ed.2d 372. See also Exhibit I-2a, p. 91A.

What is required for Boulder to obtain antitrust immunity is exactly that which creates grave First Amendment concerns. While I may have some disagreement with the almost absolutist views expressed by Judge Markey in his dissenting opinion in the Tenth Circuit, it does seem to me that the stated objective of bringing about greater diversity in programming and services will inexorably lead to such control over content as is prohibited by the First Amendment policy of freedom from government control of communications. Even if the governmental interest is viewed as legitimate, the method used to advance it must, under the First Amendment, be substantially capable of serving that interest and it must do so in a manner that is least restrictive of protected rights of speech. *Village of Schaumburg* v. *Citizens for a Better Environment*, _____ U.S. _____, 100 S.Ct. 826, 63 L.Ed.2d 73 (1980). There is little in this record to suggest that the objective of achieving diversity in programming and services will be served by a districting ordinance which prohibits the

plaintiff from conducting business in the area reserved for others.[2]

Legitimate concerns about repair of property or service blackouts may be addressed directly by a regulation imposing penalties for failure to correct such problems within a reasonable time. Likewise, a governmental interest in public service programming can be achieved in a direct fashion by negotiation for channels and payment of a fair price for the use of those channels.

Expecting a private communicator to provide, without charge, whatever the City Council may want without a showing of sufficient citizen demand or assurance of company benefit raises concerns both of coerced speech and of proprietary control by government. A generalized judicial approval of regulatory authority over cable television creates the danger that municipal governments may use the leverage of their ownership of the rights-of-way, which provide access to the public, for the exercise of pervasive control over content in an important part of the communications industry. Indeed, if such control is not maintained, can a city assert that active supervision which is required for its antitrust immunity?

It is difficult for me to see how Boulder can avoid the limitations of both of the two national policies which are strongly involved in this case. To achieve its stated purposes by exercising pervasive controls over cable communications is to violate the First Amendment, and a failure to exercise just such controls is to lose any legitimate claim of antitrust exemption.

Even if districting is acceptable as a means of furthering a legitimate governmental interest in cable television, what is

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[2] The City's own cable television expert specifically recommended against districting as not improving competition and not achieving any of the City's objectives other than giving "a piece of the action" to another company. (Exhibits I-2d, p. 1426 and I-2e, pp. 1508-1512).

the justification for the permanent exclusion of CCC from any access to the restricted area? While the legislative record includes some generalized expressions of discontent with CCC, counsel for the City conceded during oral argument that Boulder does not claim a right to revoke the plaintiff's permit because of a failure to perform any of its obligations. To criticize CCC for providing only the community antennae service to a small portion of the city for many years, without building an advanced communication system for the entire city, does not seem warranted by the evidentiary record. In my earlier opinion in this case, I noted that the evidence shows that the impact of satellite technology on the cable television industry has been very recent. And there is nothing to indicate that the City Council took any significant interest in cable television before the years 1973 and 1974, during which two attempts were made to interest other companies in the Boulder market (Exhibit I-2a, pp. 86-87). The fact that those efforts failed because of financial difficulties suggests that the plaintiff's reluctance to expand was appropriate.

It appears that from 1975 to 1978 some of the City's employees were urging expansion, but that CCC continued to be cautious. It does seem to be significant that the announcement of the palintiff's plans to extend its operation in May, 1979, evoked an initial enthusiastic response from the Mayor; but, that attitude changed when Boulder Communications Company expressed its interest. It may also be significant that BCC was initially quite willing to accept a permit to construct a system in competition with CCC but that willingness changed when the City Council began to indicate an interest in regulating the market. It is also noteworthy that in the discussions at the Council meetings leading to the enactment of Ordinance No. 4515 the president of BCC was a very strong advocate of the districting approach.

While there are some differences between the long-recognized freedom of the print media and that which is emerging for cable television, those differences are not now relevant in view of the much more significant similarities.

Suppose that the Boulder City Council perceived a need for more diversity and better quality in the newspapers available within that community. Suppose further that potential competitors to the Boulder Daily Camera claimed that they could not enter the market unless the Camera were restricted geographically and prevented from any use of the streets and sidewalks to distribute its paper in two-thirds of the City. I cannot imagine that any judge in the United States would not strike down such a restriction.

Yet, the City Council has persuaded itself that cable television is a "natural monopoly" on no better evidence than the assertion of other companies, including BCC, that they are financially unable to enter the city in competition with the plaintiff. It is of such common knowledge that judicial notice may be taken of the fact that increasing costs have caused the decline and fall of many publishing companies. Does the economic reality of one-newspaper cities justify governmental regulation of that business? Of course not. See *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241, 94 S.Ct. 2831, 41 L.Ed.2d 730 (1974). Why should it then justify the creation of side-by-side cable monopolies by governmental fiat, thereby foreclosing even the possibility of competition in communications within the prescribed areas?

The record in this case is that "competition on the poles" is possible, and it is important to recognize that the plaintiff does not claim exclusivity in the market. It now has less than one-third of the City and it recognizes the right of the City Council to grant new permits to all comers creating direct competition in all of the City. CCC is not in place everywhere and to expand it must do all that a competitor must do in achieving growth and persuading customers to purchase its nonessential services. The City's policies severely inhibit the possibility of naturally-occurring competition. With the costs of satellite receivers rapidly going down, CCC may soon even be competing with private individuals who decide to invest in such equipment, in the same manner as private persons now invest in video tape recorders.

The City vigorously contends that the plaintiff has nothing more than a revocable license to use the public ways to convey its product and that what can be revoked in its entirety can be revoked partially. As I said in my earlier opinion, assuming that the City could revoke the license without cause, it does not follow that the City may revoke for an unlawful purpose. Although there certainly remain many questions about what may and may not be regulated by a municipality in the cable television area, the plaintiff has raised very serious concerns which are a "fair ground for litigation and thus for more deliberate investigation." *Continental Oil, supra.* Whatever may be the final characterization of the property right created by the revocable permit granted in 1964, it is a right which is enhanced by its First Amendment character, and it is a right which cannot be revoked for anticompetitive reasons without a more substantial showing of legitimate governmental involvement requiring immunity from the prohibitions of the Sherman Act. It is, therefore, more than a mere license subject to a whimsical withdrawal.

I have not considered at any length the other claims of the plaintiff in the case: the claim of a denial of equal protection, the claim of inverse condemnation, or the question of whether there is a constitutional infringement of contractual or property rights. By not commenting upon them at this juncture, I do not mean to suggest anything with regard to their merit one way or the other. I have simply found that the issues raised by the claims which were discussed are substantial enough to justify an injunction, considering the conclusions I reached in balancing the interests which may be harmed.

This memorandum opinion shall serve as an amplification of the reasons supporting the order of preliminary injunction which I entered on August 25, 1980, and it is now

ORDERED that this memorandum opinion shall be submitted to the Tenth Circuit Court of Appeals as a part of the record in this case.

80-1350

No. .....

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CLERK

In The

Supreme Court of the United States

October Term, 1980

COMMUNITY COMMUNICATIONS COMPANY, INC.,

Petitioner,

vs.

CITY OF BOULDER, COLORADO, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Is the mere exercise of general home rule governing power by municipalities the equivalent of "state" action which is *by itself* sufficient to qualify for federal antitrust immunity?

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No. .....

In The

Supreme Court of the United States

October Term, 1980

COMMUNITY COMMUNICATIONS COMPANY, INC.,

Petitioner,

vs.

CITY OF BOULDER, COLORADO, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

AMICUS CURIAE BRIEF FOR THE STATE OF COLORADO IN SUPPORT OF THE PETITIONER

INTEREST OF AMICUS CURIAE

As "the Magna Carta of free enterprise," the antitrust laws are fundamental to the preservation of the American competitive economic system. *United States v. Topco Associates,* 405 U.S. 596, 610 (1972). Accordingly, Colorado has enacted an antitrust law to ensure free and open competition within the state. Colo. Rev. Stat. 1973, §§ 6-4-101 *et seq.* (attached hereto as Appendix A). The effect of the antitrust laws in Colorado is to encourage better allocation of resources, greater economic efficiency, lower consumer prices, higher product quality and greater material progress, all to the benefit of the

citizens of Colorado. *See National Society of Professional Engineers v. United States*, 435 U.S. 679, 695 (1978); *Northern Pacific Railway v. United States*, 356 U.S. 1, 4 (1958).

The instant case constitutes an extremely significant precedent with respect to competition in the State of Colorado. The impact of the Tenth Circuit's ruling on state action immunity is not limited just to the city of Boulder, Colorado, or the subject of cable television. Rather, the direct effect of that decision extends to the insulation of *all* Colorado municipalities from the operation of the antitrust laws when exercising home rule powers in *any* subject-matter area which is even arguably local in nature. Consequently, the interest of Colorado's citizens in the development and preservation of a competitive environment within the state has been thwarted by the decision of the court below.

REASONS FOR GRANTING WRIT

I. The instant case presents the issue of state action immunity for home rule municipalities, an important question of federal law which has not previously been decided by this Court.

In *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978), the Supreme Court specifically considered whether the antitrust laws apply to municipalities. A majority of the Court there ruled that cities do not automatically have antitrust immunity under *Parker v. Brown*, 317 U.S. 341 (1943), just because they are governmental entities. This Court has not heretofore expressly decided whether its holding in *City of Lafayette*, which involved non-home rule cities, applies to home rule municipalities as well. However, the court below has

decided that question in the case at hand, and it has done so in a manner which directly contravenes the principles set forth by a majority of the Supreme Court in *Lafayette*. Moreover, the several federal district courts which have considered the issue are split in their conclusions. Accordingly, *certiorari* should be granted in the instant case in order that this Court may explicate the state action immunity principles applicable to home rule municipalities.

A. The Tenth Circuit's decision and its necessary effects directly conflict with the holding and rationale of a majority of the Supreme Court in City of Lafayette.

In this case the court below held in essence that, as a home rule municipality, the city of Boulder, Colorado, has state action immunity from the antitrust laws in connection with its regulation of cable television. *Community Communications Co. v. City of Boulder*, 630 F. 2d 704 (10th Cir. 1980). Just within the Tenth Circuit alone, that opinion is of enormous significance. First and foremost, it ensures the "absolute immunity of [all 55 other constitutional home rule] Colorado cities[1] from the Sherman Act." *Id.* at 711 n. 2 (Markey, C. J., dissenting). The ruling does the same for Oklahoma's 79 constitutional home rule municipalities[2] which, like Colorado's, are empowered on purely local matters to enact ordinances superseding conflicting state laws.[3] The decision also has the same effect with respect to Kansas' 625 and

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1 *See* List of Home Rule Municipalities in Colorado (attached hereto as Appendix B).

2 *See* List of Home Rule Municipalities in Oklahoma (attached hereto as Appendix C).

3 *Lee v. Norick*, 447 P. 2d 1015 (Okla. 1968). *See* Okla. Const. art. XVIII, sec. 3(a).

Wyoming's 90 constitutional home rule cities[4] in situations where, as here, the city ordinance in question does not conflict with state statutes and the cities therefore have the same power over local matters as do the state legislatures.[5] Inasmuch as the constitutions of at least thirty-six other states also contain provisions for home rule,[6] many thousands more home rule cities in the other ten circuits across the nation undoubtedly fall into the above categories as well.

The creation of such automatic antitrust immunity for home rule cities runs directly counter to the holding by a majority of this Court in *City of Lafayette*. Likewise, it conflicts with the trend established in recent Supreme Court decisions significantly tightening the requirements for, and limiting, state action immunity.[7] *See, e.g., California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).

Moreover, if allowed to stand, the clear effect of the Tenth Circuit's ruling would be to fundamentally disrupt

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4 See League of Kansas Municipalities, Information for Kansas Officials 7-12 (1979), and List of Home Rule Municipalities in Wyoming (attached hereto as Appendix D), respectively.

5 Kan. Const. art. XII, sec. 5, and Wyo. Const. art. XIII, sec. 1, respectively. *See Garten Enterprises, Inc. v. City of Kansas City*, 549 P. 2d 864 (Kan. 1976). *Cf. Tri-County Elec. Ass'n v. City of Gillette*, 584 P. 2d 995 (Wyo. 1978) (legislature has power over municipal corporations except as provided in constitutional home rule provision).

6 Vanlandingham, *Constitutional-Municipal Home Rule Since the AMA (NLC) Model*, 17 Wm. & Mary L. Rev. 1, 4 n. 9 (1975).

7 The limiting effect of *City of Lafayette* in particular has been expressly recognized by certain of the lower federal courts. *See, e. g., In re Airport Car Rental Antitrust Litigation*, 474 F. Supp. 1072, 1088 (N. D. Cal. 1979); *Shrader v. Horton*, 471 F. Supp. 1236, 1241 (W. D. Va. 1979), *aff'd per curiam*, 626 F. 2d 1163 (4th Cir. 1980); *Woolen v. Surtran Taxicabs, Inc.*, 461 F. Supp. 1025, 1029 (N. D. Tex. 1978).

the operation of the antitrust laws by enabling thousands of cities across the country freely to disregard the anti-competitive effects of their actions. This is exactly the result which a majority of this Court sought to avoid with its holding in *Lafayette*. *See* 435 U. S. at 408.

Home rule municipalities were not excepted from the majority's rationale and conclusion in *City of Lafayette*, and logically should not be. Whether this country's tens of thousands of local government units possess home rule powers, and the breadth of those powers, makes absolutely no difference in terms of the potential posed by those entities for impairment of the national "regime of competition [which is] . . . the fundamental principle governing commerce in this country." *Id.* at 398. Accordingly, the *Lafayette* majority's holding and rationale apply with equal force and effect to home rule cities, contrary to the decision of the Tenth Circuit here.

B. The lower federal courts are split on the applicability of City of Lafayette to home rule municipalities.

The Tenth Circuit's decision in the instant case has given impetus to a developing trend in the lower federal courts. Relying on that ruling, another Colorado federal court has recently held that the exercise of municipal policy by the home rule city of Pueblo, Colorado (in connection with its ownership and operation of a municipal airport), is the equivalent of state action and so qualifies for antitrust immunity. *Pueblo Aircraft Service, Inc. v. City of Pueblo*, 498 F. Supp. 1205, 1210 (D. Colo.), *appeal docketed*, No. 80-2083 (10th Cir. Oct. 16, 1980). Such view has not been restricted just to the federal courts in Colorado, however. An Ohio federal court has similarly found the city of Akron to have state action immunity from the anti-

trust laws (in connection with its operation of a solid waste disposal facility) because it is a home rule municipality which exercises sovereign powers within its borders and so is equivalent to the state. *Glenwillow Landfill, Inc. v. City of Akron*, 485 F. Supp. 671, 677-78 (N. D. Ohio 1979), *appeal docketed sub nom. Hybud Equipment Corp. v. City of Akron*, No. 80-3121 (6th Cir. Jan. 14, 1980).

Not surprisingly, the courts in those three cases all conveniently ignored the rationale on which the majority holding in *City of Lafayette* was based. On the other hand, two of the three lower federal courts which had previously determined that home rule municipalities do not automatically have antitrust immunity expressly relied on the *Lafayette* majority's rationale in reaching that conclusion. *See In re Airport Car Rental Antitrust Litigation*, 474 F. Supp. 1072, 1088 (N. D. Cal. 1979); *Woolen v. Surtran Taxicabs, Inc.*, 461 F. Supp. 1025, 1032 (N. D. Tex. 1978). Moreover, the third court expressly noted that its analytical reliance on *Lafayette*, which included reference to the majority's rationale, would be unchanged regardless of the existence of home rule powers. *See Mason City Center Associates v. City of Mason City*, 468 F. Supp. 737, 743, 744 n. 8 (N. D. Iowa 1979).

To date, of the six federal courts which have addressed the issue of state action immunity for home rule cities, the most thorough and thoughtful analysis has been provided by the district court in *Woolen v. Surtran Taxicabs, Inc.* In the *Surtran* court's view, regardless of the extent of a home rule municipality's "sovereignty" under state law, the Supreme Court majority's rationale and holding in *City of Lafayette* established that as a matter of federal policy the antitrust laws are paramount and cities therefore do not automatically have immunity. Ac-

cordingly, the *Surtran* court expressly rejected the contention that a constitutional home rule city is a sovereign equivalent to the state itself and so immune from the antitrust laws under *Parker*. 461 F. Supp. at 1032.

Any conclusion other than the foregoing leads to the absurd result that the existence or absence of antitrust immunity depends solely on whether a local governmental unit possesses home rule powers under state law, rather than on whether it meets the federal standards identified by this Court in *City of Lafayette*. In turn, this result leads to two further difficulties. First, different immunity results may be reached among cities in the same state depending on whether or not they possess home rule powers. *Compare Pueblo Aircraft Service, Inc. v. City of Pueblo*, 498 F. Supp. 1205 (D. Colo.), *appeal docketed*, No. 80-2083 (10th Cir. Oct. 16, 1980) (Colorado home rule municipality immune) *with Stauffer v. Town of Grand Lake*, 987 Antitrust & Trade Reg. Rep. (BNA) A-9 (D. Colo. Oct. 9, 1980) (non-home rule Colorado municipality not immune). Second, opposite results may be reached with respect to the same activity among different cities depending on whether or not they possess home rule powers. *Compare Pueblo Aircraft Service, Inc. v. City of Pueblo* (home rule city's ownership and operation of municipal airport immune), *with Guthrie v. Genesee County*, 494 F. Supp. 950 (W. D. N. Y. 1980) *and Pinehurst Airlines, Inc. v. Resort Air Services, Inc.*, 476 F. Supp. 543 (M. D. N. C. 1979) (non-home rule cities not immune in connection with ownership and operation of municipal airports).

Notwithstanding the decision of the Tenth Circuit here, *City of Lafayette* makes clear that it is the challenged activity, not the status of the city involved, which

is the proper focus for state action immunity analysis. *See* 435 U. S. at 420 (Burger, C. J., concurring). The aforementioned patently inconsistent application of the state action immunity doctrine between home rule and non-home rule cities[8] indicates the need for this Court to reemphasize the proper focus in this area.

II. The Tenth Circuit has disregarded this Court's teaching in City of Lafayette with respect to state action immunity for municipalities.

A. The Tenth Circuit's decision directly conflicts with the plurality opinion of the Supreme Court in City of Lafayette.

In the case at hand, the Tenth Circuit ruled that the actions and policies of home rule cities are sufficient, in and of themselves and without the necessity for any corresponding state policy, to meet the requisites for state action immunity. 630 F. 2d at 708. Thus, it held in effect that home rule cities occupy a unique status equivalent to states for antitrust immunity purposes. In so concluding, the Tenth Circuit refused to follow the guidance provided by a plurality of this Court in *City of Lafayette*. This refusal was erroneous because the *Lafayette* plurality opinion has been cited as controlling precedent by both later Supreme Court state action immunity decisions,[9] as well as by virtually every subsequent lower federal court case

8 Although a split does not exist among the *circuits* at present, that is the best result which can be hoped for. If the Sixth Circuit does not reverse the *Glenwillow Landfill, Inc. v. City of Akron* home rule case which is now before it on appeal (see text at 5-6), the circuits will be uniform in adhering to an incorrect standard.

9 *See California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U. S. at 105; *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 439 U. S. 96, 109 (1978).

finding state action immunity for a subordinate governmental entity.[10]

In *City of Lafayette*, a plurality of this Court ruled that antitrust immunity for a state's subdivisions, such as its cities, extends only to "anticompetitive conduct engaged in as an act of government by the *State*[*'s*] . . . *subdivisions*, pursuant to *state policy* to displace competition. . . ." *Id.* at 413 (emphasis added). The plurality opinion specifically rejected the argument (of particular import for home rule cities) that municipalities necessarily act in a way reflecting state policy, and therefore have immunity, in situations where they may exercise the state's sovereign power. *Id.* at 413-14. Finally, the *Lafayette* plurality concluded that "a subordinate governmental unit's claim to *Parker* immunity is not as readily established as the same claim by a state government. . . ."[11] *Id.* at 415. In

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10 *Princeton Community Phone Book, Inc. v. Bate*, 582 F. 2d 706, 717, 719-20 (3d Cir.), *cert. denied*, 439 U. S. 966 (1978); *Pueblo Aircraft Serv., Inc. v. City of Pueblo*, 498 F. Supp. 1205, 1209 (D. Colo.), *appeal docketed*, No. 80-2083 (10th Cir. Oct. 16, 1980); *Highfield Water Co. v. Public Serv. Comm'n*, 488 F. Supp. 1176, 1190 (D. Md. 1980); *Glenwillow Landfill, Inc. v. City of Akron*, 485 F. Supp. 671, 677 (N. D. Ohio 1979), *appeal docketed sub nom. Hybud Equip. Corp. v. City of Akron*, No. 80-3121 (6th Cir. Jan. 14, 1980); *Caribe Trailer Systems, Inc. v. Puerto Rico Maritime Shipping Author.*, 475 F. Supp. 711, 721 (D. D. C. 1979), *aff'd mem.*, No. 79-1658 (D. C. Cir. Jul. 3, 1980), *petition for cert. filed*, 49 U. S. L. W. 3429 (U. S. Nov. 25, 1980); *Shrader v. Horton*, 471 F. Supp. at 1241-42; *City of Mishawaka v. American Elec. Power Co.*, 465 F. Supp. 1320, 1347 (N. D. Ind. 1979), *aff'd in part, rev'd in part*, 616 F. 2d 976 (7th Cir.), *cert. denied*, 49 U. S. L. W. 3481 (U. S. Jan. 12, 1981); *Cedar-Riverside Assocs. v. United States*, 459 F. Supp. 1290, 1298 (D. Minn. 1978), *aff'd on other grounds sub nom. Cedar-Riverside Assocs. v. City of Minneapolis*, 606 F. 2d 254 (8th Cir. 1979).

11 On the state action continuum cities fall between states, which more easily qualify for immunity, and private entities, which have a more difficult time doing so. *See Highfield Water Co. v. Public Serv. Comm'n*, 488 F. Supp. at 1189, 1190; *United States v. Southern Motor Carriers Rate Conference*, 467 F. Supp. 471, 484 (N. D. Ga. 1979).

essence, then, the plurality opinion established a dichotomy between the actions of a *state's subdivisions* and the policy of the *state itself;* the former are explicitly insufficient to confer antitrust immunity on their own.

The rationale advanced in the plurality opinion was that state action immunity derives from the dual state-federal system of sovereignty, and municipalities are not in and of themselves sovereign. Further, cities have not been treated as the equivalents of, or given the same federal deference as, the states which created them. Rather, they are mere instrumentalities of the state. *Id.* at 412. Additionally, cities have substantially less than statewide jurisdiction and might therefore express their own preferences rather than those of the state if simply left free to make individual decisions. *Id.* at 414.

The *Lafayette* plurality's conclusions are applicable in the case of home rule cities because the existence and breadth of home rule powers enjoyed by municipalities within their own borders is a consideration irrelevant to the plurality's rationale. Thus, notwithstanding the ruling of the court below, even the actions of a home rule "subdivision" of a state do not confer antitrust immunity on that subdivision absent the existence of a *state* policy to displace competition.

B. The Tenth Circuit has attempted to distinguish City of Lafayette on the unfounded basis that its applicability is limited to so-called "proprietary" activity.

The Tenth Circuit viewed *City of Lafayette* as applicable only to situations involving "proprietary," and not "governmental," activity. 630 F. 2d at 708. Supposedly, activity which is "proprietary" in nature does not qualify for state action immunity but "governmental" activity

does. However, neither *City of Lafayette* itself nor subsequent case law supports the existence of such a distinction.[12]

Only one of the nine Supreme Court justices can even arguably be said to have employed such an analytical approach in *Lafayette.* Moreover, Chief Justice Burger did not explicitly posit such a distinction but merely noted that the activity there at issue was *in fact* proprietary in nature. *See generally* 435 U. S. at 418-26 (Burger, C. J., concurring). It is illuminating to note that in the two state action immunity cases decided by this Court after *City of Lafayette,* neither Chief Justice Burger nor any other member of the Court has made any mention of such a proprietary-governmental distinction. *See California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.,* 445 U. S. 97 (1980); *New Motor Vehicle Board v. Orrin W. Fox Co.,* 439 U. S. 96 (1978).

Of course, it may be possible selectively to classify the activity involved in a particular case as being governmental or proprietary in nature. However, any such focus is meaningless for purposes of antitrust immunity analysis. Both of the post-*Lafayette* Supreme Court decisions noted above involved what could subjectively be categorized as purely "governmental" activity—the regulation by government agencies of the distribution of certain

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12 Use of any proprietary-governmental focus in state action immunity analysis is subject to logical criticism on at least two grounds. First, it simply would make no sense for a city like Boulder to be subject to the antitrust laws if it operates a facility itself, but to be immune if it delegates authority to a separate entity to act in the city's stead and then regulates that entity. This is particularly true inasmuch as the anticompetitive effects may be the same in each instance. Second, any and all action by any government arguably may be viewed as being governmental in nature. *See City of Lafayette v. Louisiana Power & Light Co.,* 435 U. S. at 432-34 (Stewart, J., dissenting).

products (wine in *Midcal* and automobiles in *Fox*). Yet, immunity was found for the "governmental" activity in the one case (*Fox*) but not in the other (*Midcal*). Thus, whether the activity in question can be characterized as governmental makes absolutely no difference to the Supreme Court for purposes of state action immunity.

The bulk of the lower federal court state action immunity cases further support this analysis. As in *Midcal*, several cases involving powers which could be classified as "governmental," such as zoning[13] or regulation of the practice of accounting,[14] have resulted in a finding of no antitrust immunity. On the other hand, several cases involving the provision of "commercial" type services similar to those involved in *City of Lafayette* have nonetheless resulted in immunity.[15]

Notwithstanding the foregoing, a handful of lower court post-*Lafayette* state action immunity cases in addition to the instant one have utilized a proprietary-governmental focus in their analysis.[16] The vast majority of

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13 *Stauffer v. Town of Grand Lake*, 987 Antitrust & Trade Reg. Rep. (BNA) A-9 (D. Colo. Oct. 9, 1980); *Whitworth v. Perkins*, 559 F. 2d 378 (5th Cir. 1977), *vacated and remanded sub nom. City of Impact v. Whitworth*, 435 U. S. 992, *reinstated on remand*, 576 F. 2d 696 (1978), *cert. denied*, 440 U. S. 911 (1979); *Mason City Center Assocs. v. City of Mason City*, 468 F. Supp. 737 (N. D. Iowa 1979).

14 *United States v. Texas State Bd. of Pub. Accountancy*, 464 F. Supp. 400 (W. D. Tex. 1978), *aff'd per curiam*, 592 F. 2d 919 (5th Cir.), *cert. denied*, 444 U. S. 925 (1979).

15 *E. g., Highfield Water Co. v. Public Serv. Comm'n*, 488 F. Supp. at 1179-81 (operation of water system); *Glenwillow Landfill, Inc. v. City of Akron*, 485 F. Supp. at 673-74 (operation of solid waste disposal facility); *City of Mishawaka v. American Elec. Power Co.*, 465 F. Supp. at 1346-47 (operation of electric, water and sewer services).

16 *Pueblo Aircraft Serv., Inc. v. City of Pueblo*, 498 F. Supp. at 1210; *In re Airport Car Rental Antitrust Litigation*, 474 F. Supp. at 1087-88; *Shrader v. Horton*, 471 F. Supp. at 1242; *Cedar-Riverside Assocs. v. United States*, 459 F. Supp. at 1298-99.

post-*Lafayette* decisions, however, have either expressly rejected[17] or simply not utilized such a distinction.[18]

Contrary to the ruling of the Tenth Circuit, then, whether an activity may subjectively be classified as proprietary or governmental in nature is not determinative of the existence or absence of state action immunity. Nevertheless, on this point there is a split of authority among the lower federal courts which should be rectified by this Court before the case law becomes further confused.

III. The Tenth Circuit has established an erroneous precedent by misapplying the state action immunity tests established by this Court for all subordinate governmental entities.

Read together, prior Supreme Court decisions mandate the undertaking of a thorough two-pronged inquiry in all cases involving the question of state action immunity for subordinate governmental entities. This analytical approach is required whether home rule powers are involved or not and whether the activity in question may arbitrarily be categorized as "proprietary" or "governmental" in nature. In short, rather than reaching any automatic conclusion based simplistically on the status of the municipality and a categorization of the activity involved, a careful determination must be made whether there exists: (i) a clearly articulated and affirmatively expressed *state* policy to displace competition with regulation or monopoly public service, and active *state* supervision of that policy, *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U. S. at 105[19];

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17 *Pinehurst Airlines, Inc. v. Resort Air Servs., Inc.*, 476 F. Supp. 543, 552 (M. D. N. C. 1979).

18 *See, e. g.*, cases cited at nn. 13, 14 and 15 *supra*.

19 *Accord, Bates v. State Bar of Arizona*, 433 U. S. 350, 360 (1977). *See also Cantor v. Detroit Edison Co.*, 428 U. S. at 585; *Goldfarb v. Virginia State Bar*, 421 U. S. at 791; *Parker v. Brown*, 317 U. S. at 352.

and (ii) "contemplation" by the state that the local governmental entity will engage in the *kind* of anticompetitive activity complained of, *City of Lafayette v. Louisiana Power & Light Co.*, 435 U. S. at 415.[20] *See generally Stauffer v. Town of Grand Lake*, 987 Antitrust & Trade Reg. Rep. (BNA) A-9 (D. Colo. Oct. 9, 1980).

A. The State of Colorado has no specific policy with respect to cable television and does not exercise supervisory power over that subject matter area.

In Colorado, there exists no express state policy relative to cable television. Neither the Colorado Constitution nor any state statute addresses the subject and no agency or mechanism has been established by Colorado for active supervision of cable television. Even the Colorado Public Utilities Commission has declined to exercise jurisdiction over the subject. *See In re Mountain States Telephone & Telegraph Co.*, 73 P.U.R. 3d 161, 172-73 (Colo. Pub. Util. Comm'n 1968).

In light of the foregoing, it cannot be said that Colorado has a comprehensive policy—which is clearly articulated, affirmatively expressed and actively supervised by the state—to displace competition in cable TV with regulation or monopoly public service as required by *Midcal. Community Communications Co. v. City of Boulder*, 630

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20 *Feminist Women's Health Center, Inc. v. Mohammad*, 586 F. 2d 530, 549-51 (5th Cir. 1978), *cert. denied*, 100 S. Ct. 262 (1979); *Highfield Water Co. v. Public Serv. Comm'n.*, 488 F. Supp. at 1190; *Guthrie v. Genesee County*, 494 F. Supp. at 956; *Pinehurst Airlines, Inc. v. Resort Air Servs., Inc.*, 476 F. Supp. at 552; *In re Airport Car Rental Antitrust Litigation*, 474 F. Supp. at 1096; *Mason City Center Assocs. v. City of Mason City*, 468 F. Supp. at 743; *United States v. Texas State Bd. of Pub. Accountancy*, 464 F. Supp. at 404; *Star Lines, Ltd. v. Puerto Rico Maritime Shipping Author.*, 451 F. Supp. 157, 165-67 (S. D. N. Y. 1978).

F. 2d at 717 (Markey, C. J., dissenting). In fact, the only policy or action expressly involved in the case at hand is that of the city of Boulder itself: "[W]e are here concerned with City action in the absence of any regulation whatever by the State of Colorado. . . . We have only the action or exercise of authority by the City. . . . [T]he regulation here concerned was . . . the only expression of policy as to the subject matter." *Id.* at 707.

The most that can be said in the instant case is that there is no *state* policy which expressly relates to the subject of cable television. In this situation, Colorado presumably would intend that its home rule cities exercise their powers in a manner consistent with the antitrust laws and the strong national policy in favor of competition. *See City of Lafayette v. Louisiana Power & Light Co.*, 435 U. S. at 414-15; *Mason City Center Associates v. City of Mason City*, 468 F. Supp. at 743. In fact, that is exactly the case here: Colorado does have one state policy which is applicable to cable TV, and it is the pro-competitive one set forth in the state's antitrust law. *See* Colo. Rev. Stat. 1973, §§ 6-4-101 *et seq.* *City of Lafayette* makes clear that pro-competitive antitrust policies take precedence over the parochial interests of individual cities. 435 U. S. at 408. Nevertheless, the court below conversely ruled that the actions and interests of the city of Boulder alone were sufficient to override the policies expressed in the antitrust laws and meet the requisites of *Midcal*.[21] 630 F. 2d at 708.

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21 The basis for the Tenth Circuit's holding in this regard was its determination that cable TV is a matter of *purely* local concern over which a home rule city has the full right of self-government. *Id.* at 706-07. Aside from the broader federal

(Continued on next page)

In the thirty-eight years since the state action immunity doctrine was first announced in *Parker*, this Court has never found an antitrust exemption without action or an expression of policy by the *state itself*. Moreover, aside from the recent aberrant decisions of the two federal courts in Colorado, no post-*Lafayette* lower federal court case has found such immunity without the existence of both a state policy and a state supervisory agency. Even in the *Glenwillow Landfill, Inc. v. City of Akron* municipal home rule case both conditions were met. *See* 485 F. Supp. at 675-77. Consequently, antitrust immunity cannot exist in a situation such as the one here, where there has been no action whatever by the state relative to the subject-matter area in question and the only state policy is one favoring competition.

B. The Colorado Constitution's grant of general home rule governing power to Colorado municipalities does not evidence contemplation by the State of Colorado that such power may be used in an anticompetitive fashion.

As a home rule city under Colo. Const. art. XX, sec. 6, Boulder has all of the powers conferred by art. XX, sec. 1, thereof on the City of Denver. Colo. Const. art.

(Continued from previous page)

policy considerations previously noted, the Tenth Circuit's reasoning fails because cable TV is inherently more than just local in character. *See United States v. Southwestern Cable Co.*, 392 U. S. 157, 168-69 (1968) (cable TV involves interstate commerce); *TV Pix, Inc. v. Taylor*, 304 F. Supp. 459, 461, 463 (D. Nev. 1968), *aff'd per curiam*, 396 U. S. 556 (1970) (cable TV is in, and an integral part of, interstate commerce); *Nugent v. City of East Providence*, 238 A. 2d 758, 762 (R. I. 1968) (cable TV is *not* so restricted to the confines of a particular city as to be *purely* local in nature for municipal home rule purposes). Any other conclusion would result in utter chaos. If cable TV is purely local, virtually any subject matter may be viewed the same way and can therefore qualify for antitrust immunity under the Tenth Circuit's approach. Accordingly, as a matter of both precedent and policy, cable TV cannot be accorded such status.

XX, sec. 6 (attached hereto as Appendix E). Consequently, Boulder is specifically empowered, *inter alia*, to regulate "works or ways local in use and extent." *Id.* sec. 1 (attached hereto as Appendix F). Because Colorado municipalities have no express authority with respect to cable TV, Boulder has always relied on this enumerated power over the public rights of way as the basis for its regulation of cable television. *See* Boulder, Colorado, City Ordinances No. 2846 (Oct. 6, 1964) at ¶¶ 1-6, No. 4472 (Jan. 1, 1980) at ¶¶ 2-8, No. 4473 (Dec. 18, 1979) at ¶ 1, and No. 4515 (Jul. 22, 1980) at ¶ 2 (attached hereto as appendices G, H, I and J, respectively).

However, the *Airport Car Rental* court expressly held that the Colorado Constitution's grant of home rule power to operate in a particular subject-matter area under art. XX, sec. 1, does not confer state action immunity on a recipient municipality. 474 F. Supp. at 1096. Accordingly, the Tenth Circuit ignored art. XX, sec. 1, and in effect found Boulder to have antitrust immunity stemming from the even more vague general governing authority contained in art. XX, sec. 6.[22] 630 F. 2d at 706-07. That

22 An additional underpinning of the Tenth Circuit's opinion on Boulder's immunity was the decision in *Manor Vail Condominium Ass'n v. Town of Manor Vail*, — Colo. —, 604 P. 2d 1168 (1980). The court below viewed that case as acknowledging, *sub silentio*, that the anticompetitive activity of setting rates for cable TV constitutes a valid exercise of municipal home rule power. 630 F. 2d at 706. However, *Manor Vail* was a 14th amendment equal protection case, and the Colorado court there considered no antitrust issues whatever. *See* 630 F. 2d at 718 (Markey, C. J., dissenting). Thus, it cannot be inferred from *Manor Vail* that Colorado home rule cities are empowered to engage in any anticompetitive activity relative to cable television. Moreover, *Manor Vail* did not involve the same type of activity as that at issue here. *Id.* n. 19. Consequently, even if interpretation of that case could be stretched to imply contemplation that home rule cities may set cable TV rates, it provides

(Continued on the next page)

provision has nothing to do with cable TV or even anti-competitive conduct; it merely confers on Boulder the right of self-government over local and municipal matters within its own borders.[23]

For three reasons, all rooted in *City of Lafayette*, the grant of general home rule governing power in art. XX, sec. 6, does not confer antitrust immunity on Colorado municipalities. For one thing, it does not constitute "authority . . . to operate in *a particular area*," and so cannot evidence contemplation of "the *kind* of action complained of." 435 U. S. at 415 (emphasis added, footnote and citation omitted). Additionally, there can be no "contemplation" of any anticompetitive activity within the meaning of *Lafayette* where, as here, there is no requirement or suggestion regarding the *manner* in which such general governing power is to be used. *See In re Airport Car Rental Antitrust Litigation*, 474 F. Supp. at 1096. Finally, viewing that amorphous provision as authorizing anticompetitive conduct by home rule cities would afford virtual blanket antitrust immunity to such municipalities *whenever* they exercise home rule powers, a result prohibited by *Lafayette*. *See Woolen v. Surtran Taxicabs, Inc.*, 461 F. Supp. at 1031-32.

(Continued from the previous page)

no authority whatever for such municipalities to engage in a *different kind* of activity such as imposing a moratorium on cable TV service. *See Woolen v. Surtran Taxicabs, Inc.*, 461 F. Supp. at 1031-32 (conferral of anticompetitive power to set rates and prohibit use of streets without governmental consent held not to contemplate anticompetitive use of such power to establish monopoly). Thus, in fact, *Manor Vail* provides no support for the Tenth Circuit's decision.

23 A similar rationale was advanced by the courts in *Pueblo Aircraft Serv., Inc. v. City of Pueblo*, 498 F. Supp. at 1209-10, and *Glenwillow Landfill, Inc. v. City of Akron*, 485 F. Supp. at 677-78.

—o—

CONCLUSION

In light of the impending cable TV explosion,[24] the importance of this case for that industry alone is enormous. The insulation of thousands of home rule municipalities nationwide from the antitrust laws carries with it unparalleled potential for anticompetitive conduct in the awarding and regulation of cable TV permits. This potential for economic harm is expanded geometrically when municipal activities in other spheres (*e. g.*, airports, utilities, zoning, etc.) are taken into consideration as well. "To permit municipalities to be shielded from the antitrust laws in such circumstances would impair the goals Congress sought to achieve by those laws . . . without furthering the policy underlying the *Parker* 'exemption.'" *City of Lafayette v. Louisiana Power & Light Co.*, 435 U. S. at 415. Consequently, if allowed to stand, the Tenth Circuit's opinion would constitute a precedent severely disruptive of "the fundamental national economic policy" of competition. *Gulf States Utilities Co. v. FPC*, 411 U. S. 747, 759 (1973). For the foregoing reasons, this Court should grant *certiorari* in the instant case and reverse the Tenth

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24 In just the next four years, the number of pay cable TV subscribers is expected to double or triple from the current 8.3 million households. It is anticipated that billions of dollars will be spent on pay cable each year. *See United States v. Columbia Pictures Indus.*, 996 Antitrust & Trade Reg. Rep. (BNA) A-7 (S. D. N. Y. Dec. 31, 1980), No. 80 Civ. 4438 (*GLG*) slip op. at 5 (attached hereto as appendix K).

Circuit's decision granting automatic antitrust immunity to home rule municipalities.

Respectfully submitted,

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APPENDIX A

COLORADO REVISED STATUTES 1973

TITLE 6

CONSUMER AND COMMERCIAL AFFAIRS

ARTICLE 4

Restraint of Trade and Commerce

6-4-101. *Illegal restraint of trade.* Every contract or combination in the nature of a trust or conspiracy in restraint of trade or commerce is declared illegal. Every combination, conspiracy, trust, pool, agreement, or contract intended to restrain or prevent competition in the supply or price of any article or commodity constituting a subject of trade or commerce in this state, or every combination, conspiracy, trust, pool, agreement, or contract which controls in any manner the price of any such article or commodity, fixes the price thereof, or limits or fixes the amount or quantity thereof to be manufactured, produced, or sold in this state, or monopolizes or attempts to monopolize any part of the trade or commerce in this state, is declared an illegal restraint of trade. (1979 Cum. Supp.)

6-4-102. *Unlawful conspiracy.* Every person, corporation, copartnership, trustee, or association who, either as principal or agent, makes any contract or engages in any combination, conspiracy, trust, pool, or agreement declared unlawful or an illegal restraint of trade under this article, or who combines or conspires with any other person, corporation, copartnership, association, or trustee to monopolize any part of the trade or commerce in this state is guilty of an unlawful conspiracy and, upon conviction thereof, shall be punished as provided in section 6-4-107.

6-4-103. *Exemptions.* (1) Nothing in this article shall be construed to forbid the existence and operation of labor,

agricultural, or horticultural organizations instituted for the purpose of mutual help, or engaged in making collective sales or marketing for its members or shareholders of farm, orchard, or dairy products produced by its members or shareholders, and not having capital stock or conducted for profit or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade under this article.

(2) The labor of a human being is not a commodity or article of commerce.

6-4-104. *Prosecution of criminal proceedings by attorney general—limitation.* The attorney general shall prosecute all criminal proceedings for violation of any of the provisions of this article. All criminal proceedings brought under this article shall be commenced within six years after the act complained of occurred, and not afterwards. (1979 Cum. Supp.)

6-4-105. *Attorney general to institute action to restrain formation of contract or combination.* The district courts may prevent or restrain, by injunction or otherwise, the formation of any such contract or combination or the execution of the purposes thereof. The attorney general shall have exclusive authority to institute such actions or proceedings as he deems necessary to prevent or restrain a violation of the provisions of this article, which shall begin by way of a complaint, setting forth the cause and grounds for the intervention of the court and praying that such violation, whether intended or continuing, shall

be enjoined or otherwise prohibited. When the parties complained against have been served with a copy of the complaint and cited to answer the same, the court shall proceed, as soon as permitted by its rules, to the hearing and determination of the case. Pending the filing of the answer to such complaint, the court may upon proper notice make such temporary restraining order or prohibition as shall be just. When it appears to the court that the ends of justice require that other persons should be made parties to the action or proceeding, the court may cause them to be brought before it in such manner as it directs. (1979 Cum. Supp.)

6-4-106. *Void contracts—refund—limitation of actions.* All contracts or agreements made by any person, firm, corporation, or association while a member of any combination, conspiracy, trust, or pool prohibited under this article which are founded upon, or are the result of, or grow out of, or are connected with any violation of this article, either directly or indirectly, shall be void, and no recovery thereon or benefit therefrom shall be had by or for any such person, firm, corporation, or association. Any payments made upon, under, or pursuant to such contract or agreement to or for the benefit of such person, firm, corporation, or association may be recovered in an action by the party making the payment, his heirs, personal representatives, or assigns, but suit for recovery shall be brought within six years after the making of said contract or agreement.

6-4-107. *Violations—penalty.* (1) Any officer, director, employee, or agent of any corporation, company, firm, or association; or any member of any company, firm, or association; or any individual who violates any provision

of this article is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than one thousand dollars nor more than five thousand dollars, or by imprisonment in the county jail for not more than one year, or by both such fine and imprisonment.

(2) Any corporation, company, firm, or association found guilty of a violation of any provision of this article shall be punished by a fine of not less than one thousand dollars nor more than five thousand dollars for the first offense and not less than one thousand dollars nor more than ten thousand dollars for the second and any subsequent offense.

6-4-108. *Damages.* Any person, corporation, copartnership, trustee, or association shall also be liable to any person transacting or doing business in this state for any damages he may sustain by reason of the doing of anything declared unlawful in this article.

6-4-109. *Construction of article.*
Repealed, L. 75, p. 261, § 1. (1979 Cum. Supp.)

APPENDIX B

List of Home Rule Municipalities in Colorado*

(as of July 1, 1980)

Alamosa
Arvada
Aspen
Aurora
Avon
Boulder
Breckenridge
Broomfield
Burlington
Canon City
Cherry Hills Village
Colorado Springs
Commerce City
Cortez
Craig
Crested Butte
Delta
Denver
Durango
Edgewater
Englewood
Evans
Fort Collins
Fort Morgan
Fountain
Glendale
Glenwood Springs
Golden
Grand Junction
Greeley
Greenwood Village
Gunnison
Lafayette
La Junta
Lamar
Littleton
Longmont
Manitou Springs
Monte Vista
Montrose
Mountain View
Mt. Crested Butte
Northglenn
Ophir
Pueblo
Rifle
Steamboat Springs
Sterling
Telluride
Thornton
Vail
Ward
Westminster
Wheat Ridge
Woodland Park
Wray

*Taken from Colorado Municipal League, Municipal and County Officials in Colorado 1980 Directory at 42 (1980).

APPENDIX C

List of Home Rule Municipalities in Oklahoma*

Ada
Anadarko
Ardmore
Atoka
Bartlesville
Bethany
Blackwell
Bristow
Chandler
Cherokee
Chickasha
Choctaw
Cleveland
Clinton
Coalgate
Collinsville
Comanche
Cordell
Cushing
Davis
Del City
Dewey
Drumwright
Duncan
Edmond
El Reno
Elk City
Enid
Guthrie
Healdton
Heavener
Kingfisher
Midwest City
Moore
Mustang
Muskogee
Newkirk
Nichols Hills
Nicoma Park
Norman
Nowata
Oklahoma City
Okmulgee
Owasso
Pauls Valley
Pawhuska
Ponca City
Pryor
Purcell
Sallisaw
Sand Springs
Sapulpa
Seminole
Shawnee
Stigler
Stillwater
Sulphur
Tahlequah
Tecumseh
The Village
Tishomingo
Tulsa
Wagoner
Walters

*Compiled from Oklahoma Municipal League, Forms of Government in Cities Having Charters (1980).

Konawa
Lawton
Lindsay
McAlester
Madill
Mangum
Marlow
Miami
Warr Acres
Waurika
Weatherford
Wewoka
Woodward
Wynnewood
Yukon

APPENDIX D

List of Home Rule Municipalities in Wyoming*

Afton
Albin
Baggs
Bairoil
Basin
Big Piney
Buffalo
Burns
Byron
Casper
Cheyenne
Chugwater
Clearmont
Cody
Cokeville
Cowley
Dayton
Deaver
Diamondville
Dixon
Douglas
Dubois
East Thermopolis
Edgerton
Elk Mountain
Encampment
Evanston
Evansville
Ft. Laramie
Frannie
Gillette
Glendo
Glenrock
Labarge
La Grange
Lander
Laramie
Lingle
Lost Springs
Lovell
Lusk
Lyman
Manderson
Manville
Marbleton
Medicine Bow
Meeteetse
Midwest
Mills
Moorcroft
Mountain View
Newcastle
Pavillion
Pine Bluffs
Pinedale
Powell
Ranchester
Rawlins
Riverside
Riverton
Rock River
Rock Springs
Saratoga
Sheridan
Shoshoni
Sinclair

*Compiled from Wyoming Association of Municipalities, Official Municipal Roster and Supplement (1980).

Granger
Green River
Greybull
Guernsey
Hanna
Hartville
Hudson
Hulett
Jackson
Kaycee
Kemmerer
Kirby
South Superior
Sundance
Ten Sleep
Thayne
Thermopolis
Torrington
Upton
Van Tassell
Wamsutter
Wheatland
Worland
Yoder

APPENDIX E

COLORADO CONSTITUTION
ARTICLE XX

Home Rule Cities and Towns

Section 6. *Home rule for cities and towns.* The people of each city or town of this state, having a population of two thousand inhabitants as determined by the last preceding census taken under the authority of the United States, the state of Colorado or said city or town, are hereby vested with, and they shall always have, power to make, amend, add to or replace the charter of said city or town, which shall be its organic law and extend to all its local and municipal matters.

Such charter and the ordinances made pursuant thereto in such matters shall supersede within the territorial limits and other jurisdiction of said city or town any law of the state in conflict therewith.

Proposals for charter conventions shall be submitted by the city council or board of trustees, or other body in which the legislative powers of the city or town shall then be vested, at special elections, or at general, state or municipal elections, upon petition filed by qualified electors, all in reasonable conformity with section 5 of this article, and all proceedings thereon or thereafter shall be in reasonable conformity with sections 4 and 5 of this article.

From and after the certifying to and filing with the secretary of state of a charter framed and approved in reasonable conformity with the provisions of this article, such city or town, and the citizens thereof, shall have the powers set out in sections 1, 4 and 5 of this article, and

all other powers necessary, requisite or proper for the government and administration of its local and municipal matters, including power to legislate upon, provide, regulate, conduct and control:

a. The creation and terms of municipal officers, agencies and employments; the definition, regulation and alteration of the powers, duties, qualifications and terms or tenure of all municipal officers, agents and employees;

b. The creation of police courts; the definition and regulation of the jurisdiction, powers and duties thereof, and the election or appointment of police magistrates therefor;

c. The creation of municipal courts; the definition and regulation of the jurisdiction, powers and duties thereof, and the election or appointment of the officers thereof;

d. All matters pertaining to municipal elections in such city or town, and to electoral votes therein on measures submitted under the charter or ordinances thereof, including the calling or notice and the date of such election or vote, the registration of voters, nominations, nomination and election systems, judges and clerks of election, the form of ballots, balloting, challenging, canvassing, certifying the result, securing the purity of elections, guarding against abuses of the elective franchise, and tending to make such elections or electoral votes non-partisan in character;

e. The issuance, refunding and liquidation of all kinds of municipal obligations, including bonds and other obligations of park, water and local improvement districts;

f. The consolidation and management of park or water districts in such cities or towns or within the jurisdiction thereof; but no such consolidation shall be effective until approved by the vote of a majority, in each district to be consolidated, of the qualified electors voting therein upon the question;

g. The assessment of property in such city or town for municipal taxation and the levy and collection of taxes thereon for municipal purposes and special assessments for local improvements; such assessments, levy and collection of taxes and special assessments to be made by municipal officials or by the county or state officials as may be provided by the charter;

h. The imposition, enforcement and collection of fines and penalties for the violation of any of the provisions of the charter, or of any ordinance adopted in pursuance of the charter.

It is the intention of this article to grant and confirm to the people of all municipalities coming within its provisions the full right of self-government in both local and municipal matters and the enumeration herein of certain powers shall not be construed to deny such cities and towns, and to the people thereof, any right or power essential or proper to the full exercise of such right.

The statutes of the state of Colorado, so far as applicable, shall continue to apply to such cities and towns, except insofar as superseded by the charters of such cities and towns or by ordinance passed pursuant to such charters.

All provisions of the charters of the city and county of Denver and the cities of Pueblo, Colorado Springs and Grand Junction, as heretofore certified to and filed with the secretary of state, and of the charter of any other city heretofore approved by a majority of those voting thereon and certified to and filed with the secretary of state, which provisions are not in conflict with this article, and all elections and electoral votes heretofore had under and pursuant thereto, are hereby ratified, affirmed and validated as of their date.

Any act in violation of the provisions of such charter or of any ordinance thereunder shall be criminal and punishable as such when so provided by any statute now or hereafter in force.

The provisions of this section 6 shall apply to the city and county of Denver.

This article shall be in all respects self-executing.

As amended November 5, 1912. (See Laws 1913, p. 669.)

APPENDIX F

COLORADO CONSTITUTION

ARTICLE XX

Home Rule Cities and Towns

Section 1. *Incorporated.* The municipal corporation known as the city of Denver, and all municipal corporations and that part of the quasi-municipal corporation known as the county of Arapahoe, in the state of Colorado, included within the exterior boundaries of the said city of Denver as the same shall be bounded when this amendment takes effect, are hereby consolidated and are hereby declared to be a single body politic and corporate, by the name of the "City and County of Denver". By that name said corporation shall have perpetual succession, and shall own, possess, and hold all property, real and personal, theretofore owned, possessed, or held by the said city of Denver and by such included municipal corporations, and also all property, real and personal, theretofore owned, possessed, or held by the said county of Arapahoe, and shall assume, manage, and dispose of all trusts in any way connected therewith; shall succeed to all the rights and liabilities, and shall acquire all benefits and shall assume and pay all bonds, obligations, and indebtedness of said city of Denver and of said included municipal corporations and of the county of Arapahoe; by that name may sue and defend, plead and be impleaded, in all courts and places, and in all matters and proceedings; may have and use a common seal and alter the same at pleasure; may purchase, receive, hold, and enjoy or sell and dispose of, real and personal property;

may receive bequests, gifts, and donations of all kinds of property, in fee simple, or in trust for public, charitable, or other purposes; and do all things and acts necessary to carry out the purposes of such gifts, bequests, and donations, with power to manage, sell, lease, or otherwise dispose of the same in accordance with the terms of the gift, bequest, or trust; shall have the power, within or without its territorial limits, to construct, condemn and purchase, purchase, acquire, lease, add to, maintain, conduct, and operate water works, light plants, power plants, transportation systems, heating plants, and any other public utilities or works or ways local in use and extent, in whole or in part, and everything required therefore, for the use of said city and county and the inhabitants thereof, and any such systems, plants, or works or ways, or any contracts in relation or connection with either, that may exist and which said city and county may desire to purchase, in whole or in part, the same or any part thereof may be purchased by said city and county which may enforce such purchase by proceedings at law as in taking land for public use by right of eminent domain, and shall have the power to issue bonds upon the vote of the taxpaying electors, at any special or general election, in any amount necessary to carry out any of said powers or purposes, as may by the charter be provided.

The provisions of section 3 of article XIV of this constitution and the general annexation and consolidation statutes of the state relating to counties shall apply to the city and county of Denver. Any contiguous town, city, or territory hereafter annexed to or consolidated with the city and county of Denver, under any of such laws of this state, in whatsoever county the same may be at the time, shall be

detached per se from such other county and become a municipal and territorial part of the city and county of Denver, together with all property thereunto belonging.

The city and county of Denver shall alone always constitute one judicial district of the state.

As amended by the People, November 5, 1974—Effective upon proclamation of the Governor, December 20, 1974.

Any other provisions of this constitution to the contrary notwithstanding:

* * *

[City of Denver annexation/consolidation limitation omitted.]

Adopted November 5, 1974—Effective upon proclamation of the Governor, December 20, 1974. (See Laws 1974, p. 457.) (1979 Cum. Supp.)

APPENDIX C

ORDINANCE NO. 2846

AN ORDINANCE GRANTING A REVOCABLE PERMIT OF THE CITY OF BOULDER, TO COLORADO TELEVENTS, INC., A COLORADO CORPORATION, TO CONDUCT THE BUSINESS OF A COMMUNITY ANTENNA TELEVISION SYSTEM IN THE CITY OF BOULDER, FOR A PERIOD OF TWENTY YEARS; AND SETTING FORTH DETAILS IN RELATION THERETO.

WHEREAS, Colorado Televents, Inc., a Colorado corporation, with offices at 270 Columbine Street, Denver, Colorado, has made application to the City Council of the City of Boulder for a permit to conduct the business of a community antenna television system in said City of Boulder through the media of transmission by cables, and/or wires, or otherwise, commonly known as a Master Antenna Cable System, and;

WHEREAS, said cable system would be attached to poles whereby said cables, wires, and related appurtenances would cross over the streets, alleys, sidewalks, highways and other public ways and places of the said City of Boulder, and;

WHEREAS, the City Council is of the opinion that the operation of a community antenna television system is necessary so that those persons who are situated in the City so as not to get adequate television reception may receive the same; and,

WHEREAS, the City Council is of the opinion that the best and most practical method of providing said services is by granting to a private person or company, revocable

authority and permission to operate such approved system upon terms and conditions prescribed and acceptable to the City.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF BOULDER, COLORADO:

Section 1. That there is hereby granted unto Colorado Televents, Inc., its successors and assigns, hereinafter referred to as the grantee, the right, permit and privilege, for a period of twenty (20) years from date of final adoption of this ordinance, to conduct the business of a Community Antenna Television System in said City of Boulder; and to erect, construct, operate and maintain on, under and above the present and future streets, alleys, highways and other public ways and places of the City of Boulder, such poles, lines, cables, wiring and related appurtenances as are necessary for the purpose of originating, receiving, amplifying and distributing television and radio signals to the inhabitants of the City of Boulder; save and except that the aforesaid rights and privileges shall be subject to the conditions, exceptions and limitations herein contained.

Section 2. That the right, permit and privilege herein granted is subject to revocation by the City Council, at its pleasure, at any time. In the event of revocation, termination or expiration of this permit the grantee shall at its own expense remove any poles, wires, cables and related appurtenances that shall have been erected and shall leave the streets, alleys, and public ways and places in as good condition as they were prior to said installation. To this end the grantee shall post a performance bond, as provided in Section 10 hereof.

Section 3. The right to use and occupy said streets, alleys and other public ways for the purposes herein set forth shall not be exclusive, and the City reserves the right to grant a similar use in said streets and alleys to any other person or persons. Wherever possible, the company shall use existing facilities of public utility companies, provided said grantee, or its assigns, first secures the permission and consent of the aforesaid public utility companies concerned, to affix said cables or wires, or other apparatus to their pole facilities.

Section 4. Poles or towers shall be so erected so as not to interfere with the traffic over the streets and alleys, and the location of all poles, towers or other structures on public property shall be placed with prior written approval and under the supervision of the City of Boulder as to such location, giving consideration to the reasonable operation of the same; providing further, that such location on public property shall not be a vested interest, and the same shall be removed by the grantee whenever, in the sole determination of the City, the same restrict or obstruct the operation or location of said streets, alleys, or public places, or municipal or franchised utilities located therein.

Section 5. Any and all streets and sidewalks disturbed or damaged in the construction or maintenance of said cables, lines and other appurtenances shall be promptly repaired by the grantee, at its expense, and to the satisfaction of the City of Boulder.

Section 6. The grantee shall be subject to all ordinances now in force, or that may hereafter be enacted, relative to the use of the streets, alleys, sidewalks and public ways and places of the City of Boulder.

Section 7. The covenants, conditions and limitations of this permit shall be binding upon the successors and assigns of the grantee, and the right granted hereunder shall not be assigned or subleased by the grantee without the prior written approval of the City of Boulder.

Section 8. The City reserves the right to adopt, from time to time, in addition to the provisions herein contained, such ordinances as may be deemed necessary to the exercise of the Police power; provided, that such regulations shall be reasonable and not destructive to the rights herein granted and not in conflict with the laws of the United States, the State of Colorado, or other local laws or regulations.

Section 9. The company hereby expressly agrees that it will save, keep harmless and defend the City of Boulder from any and all damages and liabilities it may have or sustain by reason of the construction, operation or maintenance of the system. This will be guaranteed to the City by a Public Liability and Property Damage Policy to the City in the amount of $100,000./$300,000. Public Liability, and $25,000./$50,000. Property Damage. Said policy to be negotiated and paid for by the grantee and kept in effect throughout the term of this permit.

Section 10. Within thirty (30) days after the final reading of this ordinance by the City Council, the grantee shall signify its acceptance of the terms herein by filing in the office of the Director of Finance of the City of Boulder, a bond in the sum of Five Thousand dollars (5,000.00), to be executed by the grantee, with good and sufficient surety, running to and in favor of the City of Boulder, and conditioned upon the full and faithful

performance of all the terms and conditions of the license or permit by said grantee, its successors and assigns, and upon the further condition that the City shall be saved harmless from any damage arising out of the exercise by said grantee, its successors and assigns, of the rights hereby conferred; and upon the expiration of 30 days after final reading and upon filing of said bond this license or permit shall be in full force and effect for the full term hereof. The requirement for bond running to the City of Boulder may be met by the grantee furnishing to the City a certificate, satisfactory to the Director of Finance and Record, showing that bond in like amount and for the same purposes and conditions as set forth herein has been furnished to a public utility company franchised by the City of Boulder.

Section 11. The grantee shall commence operations as a community antenna television system in the City of Boulder within three (3) years from the effective date of this ordinance, or shall otherwise forfeit all rights and privileges granted hereunder, but otherwise this permit to remain in full force and effect.

Section 12. As a further consideration of this permit or license, and in lieu of all occupation and license taxes or other taxes on the right to do business, the grantee agrees to pay on the 1st day of January annually to the City of Boulder a sum equal to two per cent (2%) of its gross revenue derived from the conduct of its business within the corporate limits of the City or $100, whichever is the greater. The City shall have access to the grantees books and records to verify the amount due the City as reported by the grantee.

This ordinance shall take effect upon the expiration of thirty (30) days from adoption and publication in accordance with the Charter of the City of Boulder.

INTRODUCED, READ AND ORDERED PUBLISHED this 15th day of September, A.D. 1964.

/s/ H. Paul Crouch
Mayor

Attest:

/s/ M. E. Gause
Director of Finance and Record
Ex-officio City Clerk

READ ON SECOND READING, PASSED AND ADOPTED this 6th day of October, A.D. 1964.

/s/ H. Paul Crouch
Mayor

Attest:

/s/ M. E. Gause
Director of Finance and Record
Ex-officio City Clerk

APPENDIX H

ORDINANCE NO. 4472

AN ORDINANCE REPEALING ORDINANCE NO. 2846, REVOKING THE PERMIT TO CONDUCT THE BUSINESS OF A COMMUNITY ANTENNA TELEVISION SYSTEM GRANTED THEREUNDER; REENACTING SAID ORDINANCE WITH TEMPORARY GEOGRAPHICAL LIMITATIONS UPON THE GRANTEE; GRANTING A REVOCABLE PERMIT TO COMMUNITY COMMUNICATIONS COMPANY, INC., UNDER SAID ORDINANCE; AND SETTING FORTH DETAILS IN RELATION THERETO.

WHEREAS, the City Council of the City of Boulder granted a revocable permit to Colorado Televents, Inc., in 1964 to conduct the business of a Community Antenna Television System in the City of Boulder; and

WHEREAS, said permit was transferred and assigned to its current holder, Community Communications Company, Inc., a wholly owned subsidiary of Community Tele-Communications, Inc., in 1966; and

WHEREAS, cable television companies have within recent months displayed interest in serving the community and have requested the City Council to grant permission to use the public right-of-way in providing that service; and

WHEREAS, the present permittee, Community Communications Company, Inc., has indicated that it intends to extend its services in the near future to an additional 35 miles of the City of Boulder right-of-way; and

WHEREAS, the City Council finds that such an extension of service by the current permittee would result

in hindering the ability of other companies to compete in the Boulder market; and

WHEREAS, the City Council intends to adopt a model cable television permit ordinance, solicit applications from interested cable television companies, evaluate such applications, and determine whether or not to grant additional permits in a reasonably short time, not to extend past March 18, 1980, and finds that an extension of service by the current permittee would result in a disruption of this application and evaluation process; and

WHEREAS, the City Council finds that placing temporary geographical limitations upon the operations of the current permittee would not impair the present services offered by Community Communications Company, Inc., to City of Boulder residents, and would not impair the ability of the current permittee to improve those services within the area presently served by it; and

WHEREAS, the City Council finds that it is in the public interest to repeal Ordinance No. 2846, to revoke the permit now held by Community Communications Company, Inc., to re-enact said ordinance with temporary geographical limitations, and to grant a revocable permit to Community Communications Company, Inc., under said ordinance as re-enacted.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF BOULDER, COLORADO:

Section 1. That Ordinance No. 2846 is hereby repealed, and the revocable permit granted thereunder to Colorado Televents, Inc. and its assignee, Community

Communications, Inc., to conduct the business of a Community Antenna Television System in the City of Boulder is hereby revoked.

Section 2. That Ordinance No. 2846 is hereby reenacted to read as follows:

There is hereby granted unto Community Communications Company, Inc., a Colorado corporation and wholly owned subsidiary of Community Tele-Communications, Inc., a Colorado corporation, its successors and assigns, hereinafter referred to as the grantee, the right, permit and privilege, until November 6, 1984, to conduct the business of a Community Antenna Television System in said City of Boulder; and to erect, construct, operate and maintain on, under and above the present and future streets, alleys, highways and other public ways and places of the City of Boulder, such poles, lines, cables, wiring and related appurtenances as are necessary for the purpose of originating, receiving, amplifying and distributing television and radio signals to the inhabitants of the City of Boulder; save and except that the aforesaid rights and privileges shall be subject to the conditions, exceptions and limitations herein contained.

Section 3. The City Council intends within a time not to extend past March 18, 1980, to adopt a model cable television permit ordinance, solicit applications from interested cable television companies, evaluate such applications, and determine whether or not to grant additional permits. During the pendency of this application and evaluation process, not to extend past March 18, 1980, the grantee's right, permit and privilege to erect, construct, operate and maintain on, under and above the

present and future streets, alleys, highways and other public ways and places of the City of Boulder, such poles, lines, cables, wiring and related appurtenances as are necessary for the purpose of originating, receiving, amplifying and distributing television and radio signals to the inhabitants of the City of Boulder shall be exercised only within the geographical boundaries set forth in Exhibit A, attached to this ordinance and incorporated by reference herein.

It is the intent of this Section 3 that the grantee shall not expand its present system through working in the public right-of-way beyond the geographical areas presently served by the grantee during the effective period of this Section. In addition to any and all other remedies available to the City, a violation of this Section shall be grounds for immediate revocation of the permit granted herein and forfeiture of the performance bond referred to herein.

This Section shall expire and be of no effect upon the completion of the application and evaluation process described herein, and in any case no later than March 18, 1980.

Section 4. The right, permit and privilege herein granted is subject to revocation by the City Council, at its pleasure, at any time. In the event of revocation, termination or expiration of this permit, the grantee shall, at its own expense, remove any poles, lines, cables, wiring, and related appurtenances that shall have been erected and shall leave the streets, alleys, highways and public ways and places in as good condition as they were prior to said installation. To this end the grantee shall post a performance bond, as provided in Section 10 hereof.

Section 5. The right to use and occupy said streets, alleys, highways and other public ways and places for the purposes herein set forth shall not be exclusive, and the City reserves the right to grant a similar use to any other person or persons. Wherever possible, the company shall use existing facilities of public utility companies, provided said grantee, or its assigns, first secures the permission and consent of the aforesaid public utility companies concerned, to affix said lines, cables, wiring or related appurtenances to their pole facilities.

Section 6. Poles or towers shall be so erected so as not to interfere with the traffic over the streets, alleys, highways and other public ways and places, and all poles, towers or other structures placed on public property shall be placed with the prior written approval and under the supervision of the City of Boulder as to such location, giving consideration to the reasonable operation of the same; providing further, that such location on public property shall not be a vested interest, and the same shall be removed by the grantee whenever, in the sole determination of the City, the same restrict or obstruct the operation or location of said streets, alleys, highways, or other public ways or places, or municipal or franchised utilities located therein.

Section 7. Any and all streets and sidewalks disturbed or damaged in the construction or maintenance of said lines, cables, wiring or related appurtenances shall be promptly repaired by the grantee, at its expense, and to the satisfaction of the City of Boulder.

Section 8. The grantee shall be subject to all ordinances now in force, or that may hereafter be enacted,

relative to the use of the streets, alleys, highways and other public ways and places of the City of Boulder.

Section 9. The covenants, conditions and limitations of this permit shall be binding upon the successors and assigns of the grantee, and the right granted hereunder shall not be assigned or subleased by the grantee without the prior written approval of the City of Boulder.

Section 10. The City reserves the right to adopt, from time to time, in addition to the provisions herein contained, such ordinances as may be deemed necessary to the exercise of the Police power; provided, that such regulations shall be reasonable and not destructive to the rights herein granted and not in conflict with the laws of the United States, the State of Colorado, or other local laws or regulations.

Section 11. The grantee hereby expressly agrees that it will save, keep harmless and defend the City of Boulder from any and all damages and liabilities it may have or sustain by reason of the construction, operation or maintenance of the activities permitted hereby. This will be guaranteed to the City by a Public Liability and Property Damage Policy to the City in the amount of $100,000/$300,000 for public liability, and $25,000/$50,000 for property damage. Said policy shall be negotiated and paid for by the grantee and kept in effect throughout the term of this permit.

Section 12. The grantee shall signify its acceptance of the terms hereof by continuing to provide service to any customers presently served by the grantee. The grantee shall file in the office of the Director of Finance of the City of Boulder, a bond in the sum of Five Thousand

dollars ($5,000.00), to be executed by the grantee, with good and sufficient surety, running to and in favor of the City of Boulder, and conditioned upon the full and faithful performance of all the terms and conditions hereof by said grantee, its successors and assigns, and upon the further condition that the City shall be saved harmless from any damage arising out of the exercise by said grantee, its successors and assigns, of the rights hereby conferred. The requirement for a bond running to the City of Boulder may be met by the grantee furnishing to the City a certificate, satisfactory to the Director of Finance and Record, showing that a bond in like amount and for the same purposes and conditions as set forth herein has been furnished to a public utility company franchised by the City of Boulder.

Section 13. As a further consideration of this permit or license, and in lieu of all occupation and license taxes or other taxes on the right to do business, the grantee agrees to pay on the 1st day of January annually to the City of Boulder a sum equal to two percent (2%) of its gross revenue derived from the conduct of its business within the corporate limits of the City or $100, whichever is the greater. The City shall have access to the grantee's books and records to verify the amount due the City as reported by the grantee.

Section 14. If any part or parts hereof are for any reason held to be invalid, such shall not affect the remaining portions of this ordinance.

INTRODUCED, READ AND ORDERED PUBLISHED BY TITLE ONLY this 18th day of December A.D. 1979.

/s/ Ruth A. Correll

Mayor

Attest:

/s/ Cappie I. Fine

Director of Finance and Record
Ex-officio City Clerk

READ ON SECOND READING, PASSED AND ADOPTED this 1st day of January, A.D. 1980.

/s/ Ruth A. Correll
Mayor

Attest:

/s/ Cappie I. Fine

Director of Finance and Record
Ex-officio City Clerk

EXHIBIT A

An area described as follows:

A point at which the City limits of the City of Boulder on the West and the Northern boundary line of the National Bureau of Standards property intersect, East along the Northern boundary line of the National Bureau of Standards property to Broadway, North on Broadway to University Avenue, East on University Avenue to 17th Street, North on 17th Street to Canyon Boulevard, West on Canyon Boulevard to 9th Street, North on 9th Street to Spruce Street, West on Spruce Street to the Eastern boundary of Knollwood Village, North along the Eastern boundary of Knollwood Village to the City limits of the City of Boulder on the West, and South along the City limits to the point of beginning, plus any area used for any earth station and any area used for the transmission of signals from any earth station, to the area set forth above.

A map indicating this area is attached to this Exhibit A and incorporated herein.


CANYON BLVD.
FOLSOM
University of Colorado
TABLE MESA DR.
4-10

APPENDIX I

ORDINANCE NO. 4473

AN EMERGENCY ORDINANCE AMENDING ORDINANCE NO. 2846 TO PLACE TEMPORARY GEOGRAPHICAL LIMITATIONS UPON THE GRANTEE; AND SETTING FORTH DETAILS IN RELATION THERETO.

WHEREAS, the City Council of the City of Boulder granted a revocable permit to Colorado Televents, Inc., in 1964 to conduct the business of a Community Antenna Television System in the City of Boulder; and

WHEREAS, said permit was transferred and assigned to its current holder, Community Communications Company, Inc., a wholly owned subsidiary of Community Tele-Communications, Inc., in 1966; and

WHEREAS, cable television companies have within recent months displayed interest in serving the community and have requested the City Council to grant permission to use the public right-of-way in providing that service; and

WHEREAS, the present permittee, Community Communications Company, Inc., has indicated that it intends to extend its services in the near future to an additional 35 miles of the City of Boulder right-of-way; and

WHEREAS, the City Council finds that such an extension of service by the current permittee would result in hindering the ability of other companies to compete in the Boulder market; and

WHEREAS, the City Council intends to adopt a model cable television permit ordinance, solicit applications from

interested cable television companies, evaluate such applications, and determine whether or not to grant additional permits in a reasonably short time, not to exceed 3 months, and finds that an extension of service by the current permittee would result in a disruption of this application and evaluation process; and

WHEREAS, the City Council finds that placing temporary geographical limitations upon the operations of the current permittee would not impair the present services offered by Community Communications Company, Inc., to City of Boulder residents, and would not impair the ability of the current permittee to improve those services within the area presently served by it.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF BOULDER, COLORADO:

Section 1. That Ordinance No. 2846 is hereby amended by the addition of the following sections:

> The City Council intends within a time not to exceed 3 months from the adoption of this ordinance to adopt a model cable television permit ordinance, solicit applications from interested cable television companies, evaluate such applications, and determine whether or not to grant additional permits. During the pendency of this application and evaluation process, not to exceed 3 months from the adoption of this ordinance, the grantee's right, permit, license and privilege to erect, construct, operate and maintain on, under and above the present and future streets, alleys, highways and other public ways and places of the City of Boulder, such poles, lines, cables, wiring and re-

lated appurtenances as are necessary for the purpose of originating, receiving, amplifying and distributing television and radio signals to the inhabitants of the City of Boulder shall be exercised only within the geographical boundaries set forth in Exhibit A, attached to this ordinance and incorporated by reference herein.

It is the intent of this Section 1 that the grantee shall not expand its present system through working in the public right-of-way beyond the geographical areas presently served by the grantee during the effective period of this Section. In addition to any and all of the remedies available to the City, a violation of this Section shall be grounds for immediate revocation of the permit granted in Ordinance No. 2846 and forfeiture of the performance bond referred to therein.

This Section shall expire and be of no effect upon the completion of the application and evaluation process described herein, and in any case no later than March 18, 1980.

Section 2. The City Council finds that initiation of the application and evaluation process described herein is of immediate importance to the residents of Boulder, and that it is necessary to impose a temporary geographical limitation upon the grantee without delay. The City Council finds that an emergency exists, and that this ordinance is necessary for the preservation of the public peace, health, and safety.

Section 3. If any part or parts hereof are for any reason held to be invalid, such shall not affect the remaining portions of this ordinance.

INTRODUCED, READ, PASSED AS AN EMERGENCY MEASURE BY A TWO-THIRDS VOTE, AND ORDERED PUBLISHED IN FULL this 18th day of December A. D. 1979.

/s/ Ruth L. Correll
Mayor

Attest:

/s/ Cappie I. Fine
Director of Finance and Record
Ex-officio City Clerk

STATE OF COLORADO,)
COUNTY OF BOULDER,) ss.
CITY OF BOULDER,)

I, Cappie I. Fine Director of Finance and Record and Ex-Officio City Clerk of said City in the County and State aforesaid, do hereby certify that the foregoing ordinance was introduced and read in full at a regular meeting of the City Council of said City, held on the 18th day of December A. D. 1979, and was on to wit: the 18th day of December A. D. 1979, passed and approved as an emergency ordinance under the City Charter, two-thirds and more of the Councilmen being present and voting in the affirmative. That afterwards, to wit: on the 19th day of December A. D. 1979, I caused the same to be published in full in the official paper of said City (the same being a paper of general circulation published in said City).

Witness my hand and the seal of said City of Boulder, hereto affixed, this 7th day of January A. D. 1980.

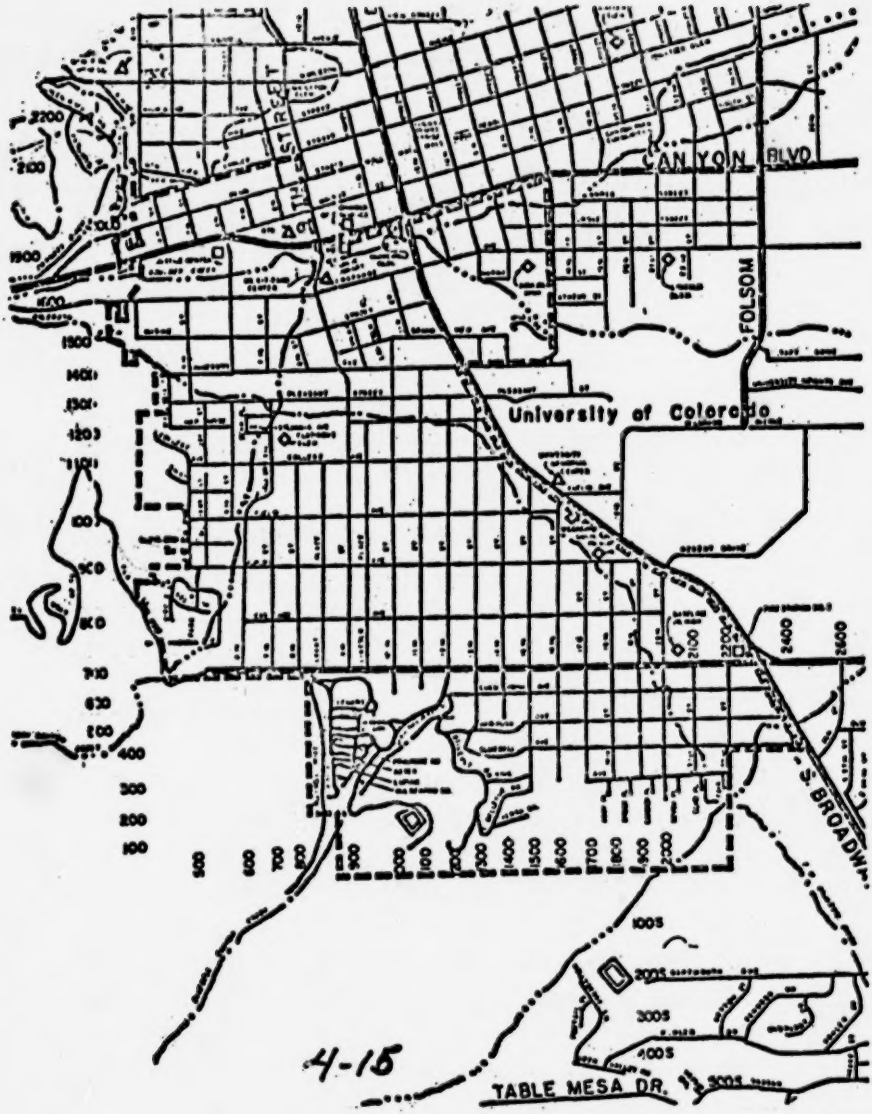
/s/ Cappie I. Fine
Director of Finance and Record,
Ex-Officio City Clerk.

EXHIBIT A

An area described as follows:

A point at which the City limits of the City of Boulder on the West and the Northern boundary line of the National Bureau of Standards property intersect, East along the Northern boundary line of the National Bureau of Standards property to Broadway, North on Broadway to University Avenue, East on University Avenue to 17th Street, North on 17th Street to Canyon Boulevard, West on Canyon Boulevard to 9th Street, North on 9th Street to Spruce Street, West on Spruce Street to the Eastern boundary of Knollwood Village, North along the Eastern boundary of Knollwood Village to the City limits of the City of Boulder on the West, and South along the City limits to the point of beginning, plus any area used for any earth station and any area used for the transmission of signals from any earth station, to the area set forth above.

A map indicating this area is attached to this Exhibit A and incorporated herein.


CANYON BLVD
FOLSOM
University of Colorado
S. BROADWAY
TABLE MESA DR.
4-15

APPENDIX J

ORDINANCE NO. 4515

AN ORDINANCE PARTIALLY REVOKING ORDINANCE NO. 2846 TO PLACE PERMANENT GEOGRAPHICAL LIMITATIONS UPON THE GRANTEE; TO REQUIRE INTERCONNECTION WITH OTHER GRANTEES; AND SETTING FORTH DETAILS IN RELATION THERETO.

WHEREAS, the City Council of the City of Boulder granted a revocable permit to Colorado Televants, Inc. in 1964 to conduct the business of a community antenna television system in the City of Boulder, pursuant to Section 115 of the Boulder City Charter; and

WHEREAS, said permit was transferred and assigned to its current holder, Community Communications Company, Inc. (the "grantee"), a wholly owned subsidiary of Tele-Communications, Inc., in 1966; and

WHEREAS, the City Council finds that advanced, state-of-the-art cable communications services can and will enhance the quantity and quality of education, news, entertainment, institutional and residential services, cultural opportunities, and opportunities for self-expression available to the public, that such cable communications services can and will promote the convenience of the public and of the commercial and governmental institutions within the City, that such cable communications services may decrease the public's use of energy, and that such cable communications services can and will serve the public interest; and

WHEREAS, the City Council finds that during the past 14 years the grantee has failed and neglected to expand its community antenna television system with reasonable expedition to serve all, or even a major portion, of the citizens of the City, and that it has also failed and neglected to offer advanced, state-of-the-art cable communications services to the citizens of the City; and

WHEREAS, during the past 14 years the City also has received and is aware of complaints from customers of the grantee within the City concerning poor quality television reception, blacking-out of channels and programs, and unresponsiveness of the grantee in addressing and correcting these operational problems; and

WHEREAS, within the past year, various cable communications companies have displayed interest in serving the comunity and have requested the City Council to grant permission to use the public right-of-way in providing that service; and

WHEREAS, during the winter and spring of 1980, the City undertook to enhance the diversity and quality of cable communications services available to the public by conducting an application and selection process for cable communications companies and by offering a permit or permits to construct and operate a cable communications system or systems within the City in direct competition with one another and with the grantee, on terms to be negotiated with the City; and

WHEREAS, each of the cable communications applicants declined such a permit on any terms and requested a permit covering areas within the City from which the

grantee would be excluded from constructing and operating any cable television system; and

WHEREAS, as a matter of policy, the City Council has looked with favor upon direct competition between cable communications companies within the same geographical areas as the most reasonable means of promoting innovative, diversified, and economical cable communications services within the City; and

WHEREAS, the City Council now reluctantly finds that direct competition between cable communications companies within the same geographical areas is not possible now or in the foreseeable future in the City, that the grantee's position in the City has become an entrenched "natural monopoly," and that direct competition is not now or in the foreseeable future a feasible means of promoting innovative, diversified and economical cable communications services within the City; and

WHEREAS, the City Council finds that in the absence of direct competition, innovative, diversified and economical cable communications services can be best promoted within the City by creating the possibility of competition, or at least comparison, between different cable communications companies operating in different areas of the City, by placing permanent geographical restrictions on the grantee, by granting within a reasonably short period of time a permit to a cable communications company other than the grantee to provide service in other areas of the City, and by requiring reasonable interconnection between the systems of the community antenna television and cable communications companies within the City; and

WHEREAS, the City Council intends within a reasonably short period of time to conduct and complete an additional process of soliciting applications from interested cable communications companies, evaluating such applications, and granting a permit to another company to provide cable communications services in areas primarily outside those areas which are and may be served by the grantee; and

WHEREAS, in order to avoid any assertion that the City is acting in a proprietary capacity in undertaking what the City Council deems to be the essential governmental objective of districting the City, the City will set the franchise fee for any new cable communications company granted a permit in the City at the same level as that paid by the grantee, through the expiration of the grantee's permit in 1984; and

WHEREAS, the City Council finds that it is in the public interest to initiate such a process in an expeditious manner; and

WHEREAS, the City Council finds that during the winter and the spring of 1980, the grantee has constructed and expanded parts of its community antenna television system in the City; and

WHEREAS, the City Council finds that at times during the winter of 1980, the grantee constructed and expanded parts of its community antenna television system in the City in violation of Ordinances 4472 and 4473 (1979); and

WHEREAS, the grantee has indicated to the City that it intends to continue to expand and construct parts of its

community antenna television system in the City, absent legislative action by the City Council; and

WHEREAS, the City Council finds that continued construction and expansion of parts of the grantee's community antenna television system in the City will substantially disrupt and impede the process of soliciting applications from other interested cable communications companies, evaluating such applications, and granting a permit to a company other than the grantee to provide cable communications services in a part of the City; and

WHEREAS, the City Council finds that placing permanent geographical restrictions upon the operations of the grantee will minimize, if not eliminate, such disruption; and

WHEREAS, the City Council finds that placing permanent geographical limitations upon the operations of the grantee will not impair the present services offered by the grantee to City residents; and

WHEREAS, the City Council finds that placing permanent geographical limitations upon the operations of the grantee will not impede its ability to expand its community antenna television services to numerous customers in addition to those it now serves, nor will it impede the grantee's ability to offer innovative, economical, state-of-the-art services to all its customers; and

WHEREAS, the City Council finds that the area set forth in Exhibit A, attached to this Ordinance and incorporated by reference herein, is a viable market area which allows for the development and operation of a profitable community antenna television system by the grantee; and

WHEREAS, the grantee may continue to operate in the area specified in Exhibit A without any further condition, except for the terms of its original permit and the additional requirement of interconnection with other cable communications companies operating in the City; and

WHEREAS, the grantee has asserted that any limitation on its expansion in the City would violate the First Amendment to the United States Constitution; and

WHEREAS, the City Council rejects such assertion, finding that the expansion of the grantee's community antenna television system is not protected activity, that the grantee's assertion of First Amendment protection is an overbroad attempt to further entrench its monopoly position by requiring that the grantee's permit be maintained and renewed *ad infinitum* despite the absence of any prospect for direct competition from other cable communications companies now or in the foreseeable future, and that the paramount First Amendment rights of the inhabitants of the City require that the City take action to assure a diverse market place of ideas by districting the City; and

WHEREAS, the City Council finds that it is in the public interest to place permanent geographical limitations upon the operations of the grantee, to partially revoke Ordinance No. 2846, to grant within a reasonably short period of time a permit to an additional company to provide cable communications services in other areas of the City, and to require reasonable interconnection between the systems of the community antenna television and cable communications companies within the City.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF BOULDER, COLORADO:

Section 1. That the revocable permit granted under Ordinance No. 2846 to Colorado Televents, Inc. and its assignee, Community Communications Company, Inc., to conduct the business of a community antenna television system in the City of Boulder is hereby partially revoked, as hereinafter provided.

Section 2. That Ordinance No. 2846 is hereby amended by the addition of the following:

> The grantee's right, permit, license and privilege to erect, construct, operate and maintain on, under and above the present and future streets, alleys, highways and other public ways and places of the City of Boulder, such poles, lines, cables, wiring and related appurtenances as are necessary for the purpose of originating, receiving, amplifying and distributing television and radio signals to the inhabitants of the City of Boulder shall be exercised only within the geographical boundaries set forth in Exhibit A, attached to this ordinance and incorporated by reference herein.
>
> In addition to any and all of the remedies available to the City, a violation of this Section shall be grounds for immediate revocation of the permit granted in Ordinance No. 2846 and forfeiture of the performance bond referred to therein.
>
> The right, permit and privilege herein granted is subject to such reasonable requirements as the City Council may subsequently adopt concerning inter-

connection with other cable systems in the City of Boulder.

Section 3. If any part or parts hereof are for any reason held to be invalid, such shall not affect the remaining portions of this ordinance.

INTRODUCED, READ AND ORDERED PUBLISHED IN FULL this 1st day of July A. D. 1980.

/s/ Ruth A. Correll
Mayor

Attest:

/s/ Cappie I. Fine
Director of Finance and Record
Ex-officio City Clerk

READ ON SECOND READING, PASSED, ADOPTED AND ORDERED PUBLISHED BY TITLE ONLY this 22nd day of July, A. D. 1980.

/s/ Ruth A. Correll
Mayor

Attest:

/s/ Cappie I. Fine
Director of Finance and Record
Ex-officio City Clerk

APPENDIX K

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,
Plaintiff,

—against—

COLUMBIA PICTURES INDUSTRIES, INC.; GETTY OIL COMPANY; MCA, INC.; PARAMOUNT PICTURES CORPORATION; and TWENTIETH CENTURY-FOX FILM CORPORATION,
Defendants,

—and—

PREMIERE,
Intervenor-Defendant.

OPINION

APPEARANCES:

UNITED STATES DEPARTMENT OF JUSTICE
ANTITRUST DIVISION
Attorneys for Plaintiff
Washington, D. C. 20530

By: Seymour H. Dussman, Esq.
Gordon B. Stoner, Esq.
Karen Magid, Esq.
Elisabeth P. Hyde, Esq.
Stanley M. Gorinson, Esq.
Robert E. Hauberg, Jr., Esq.
Of Counsel

SIMPSON, THACHER & BARTLETT
Attorneys for Defendant
Paramount Pictures Corporation
One Battery Park Plaza
New York, New York 10004

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FOOTNOTES

* * *

2 A satellite company has recently announced its intention to transmit pay television signals directly to subscribers' homes by having them equipped with their own dish-shaped antennas functioning as a simplified earth station. Satellite Week, Dec. 22, 1980, at 1.

3 Such a system negotiates directly with suppliers of individual programming or with brokers.

4 In the last two years, franchises have been granted in ten major metropolitan markets, including Dallas, Pittsburgh, Houston, Cincinnati, Oklahoma City, Kansas City, and the twin cities of Minneapolis and St. Paul.

* * *

and thus the enormous cost of installing cable systems avoided, even greater growth of pay television can be expected.[2]

At the present time, approximately 31 million of the 77 million television households in the United States have cable service available to them. (The phrase used in the industry is "homes passed.") Of these, more than half (*i. e.*, 17.2 million) are basic cable subscribers. Of the basic cable subscribers, almost half, 8.3 million, receive pay television.

Most of the cable operators serving these subscribers are affiliated with one or another network program service, although it is still possible for an individual cable operator to program its pay television channel as a "stand alone."[3] However, there are financial and technical disadvantages to operating individually. The equipment needed to program on a "stand alone" basis is more expensive and more personnel are needed to operate it. Moreover (surprisingly), the satellite-distributed network signal provides a higher quality picture than those transmitted from independent stations using cassettes or disks.

Pay television has grown significantly since its inception in 1972. By 1985, it is estimated that there will be between 16 million and 25 million households subscribing to pay television. Billions of dollars annually will be spent on pay television. So popular is the service that it has promoted the growth of cable systems in major metropolitan areas.[4]

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No. 80-1350

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

COMMUNITY COMMUNICATIONS COMPANY, INC.
Petitioner,

v.

CITY OF BOULDER, COLORADO, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE TENTH CIRCUIT COURT OF APPEALS

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

1. Are home rule municipalities automatically exempt from liability under the federal antitrust laws by operation of the state action doctrine?

2. Assuming *arguendo* that the acts here complained of can be properly classified as "non-proprietary" or "governmental", is Respondent City of Boulder exempt from liability under the federal antitrust laws, because *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978), is limited to "proprietary" conduct?

PARTIES TO THE PROCEEDING

Petitioner: Community Communications Company, Inc., a Colorado corporation and a wholly owned subsidiary of Tele-Communications, Inc., a Delaware corporation (see Appendix to Petition for Writ of Certiorari for List of Petitioner's Affiliated Companies).

Respondents: City of Boulder, Colorado; Boulder Communications Co., a Colorado corporation; Thomas Cross; I. Jack Kerner; Michael Thompson; Donald Passalaqua; Barry Telleen; and Dennis DuBé.

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No. 80-1350

IN THE

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OCTOBER TERM, 1980

COMMUNITY COMMUNICATIONS COMPANY, INC.
Petitioner,

v.

CITY OF BOULDER, COLORADO, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE TENTH CIRCUIT COURT OF APPEALS

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 630 F.2d 704, and appears in the Appendix to the Petition for Writ of Certiorari ("P.A." herein), at A-1 to A-35. The opinion of the United States District Court for the District of Colorado is reported at 485 F.Supp. 1035, and also appears in said Appendix (P.A. at A-36 to A-46).

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on May 28, 1980. A timely petition for rehearing en banc was denied by order entered October 1, 1980. The Petition for a Writ of Certiorari was filed on February 9, 1981, within the time set by Order of Justice White, dated December 9, 1980. Certiorari was granted on April 6, 1981. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) (1966).

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

The following constitutional provisions, statutes, and ordinances are quoted in P.A., at A-47 to A-69. Home Rule Amendment, Colo. Const. art. XX, § 6; Boulder, Colo., Ordinance No. 2846 (Oct. 6, 1964); Boulder, Colo., Ordinance No. 4472 (Dec. 18, 1979); Boulder, Colo., Ordinance No. 4473 (Dec. 18, 1979); Colorado Antitrust Statute, Colo. Rev. Stat. §§ 6-4-101, 6-4-102 (1974 & Supp. 1979); Municipal Powers Statute, Colo. Rev. Stat. §31-15-702(1) (1974); Sherman Antitrust Act §§ 1, 2, 26 Stat. 209, as amended, 15 U.S.C. § 1,2, (1976); Supremacy Clause, U.S. Const. art. VI, Cl. 2.

STATEMENT OF THE CASE

This case involves respondent's attempt to use its control over access to a competitive marketplace as a means of contractually implementing a market allocation scheme. The District Court below preliminarily enjoined this clear restraint of trade, but the United States Court of Appeals for the Tenth Circuit reversed, on the ground that respondent city is exempt from liability under the antitrust laws. The following facts are relevant.

On October 6, 1964, Colorado Televents, Inc. entered into a 20 year, revocable agreement with the City of Boulder, Colorado ("City"), which permitted, but did not require, the company to serve the entire City. The terms of the contract are set forth in Ordinance #2846. In 1966 Colorado Televents assigned its rights under the contract to Petitioner, CCC. Joint Appendix, at 9 ("J.A." hereafter). CCC restricted its service to a small area of the City which was foreclosed by geography from enjoying good, off-air reception of television signals. At that time, the economics of cable television and FCC regulations against the importation of distant signals prevented

CCC from expanding to areas in the City where cable television service was not a prerequisite to good reception. (Sparkman Tr. March 4, at 110:24-111:19; 113:17-114; Pilnick Tr. March 5, at 157:15-17).

From 1972 to 1974, Boulder initiated two requests for proposal (RFP) processes which sought bids from cable television companies interested in serving the City. The result of each process was the selection of one company to serve the entire City. At that time, the City imposed a provision on the new permittee requiring the "buy out" of CCC, although CCC never accepted such an arrangement. These companies, however, were unable to raise funds sufficient to build their proposed citywide systems, and CCC remained in operation. This fact validated CCC's conclusion in the early 1970s that it would be financially imprudent to expand to serve the entire city. (Sparkman Tr. March 4, at 115: 20-117:14; 118:10; Sample Tr. March 4, at 178:4-179:12).

In 1976, the economics and overall character of the cable television industry were dramatically affected by the advent of satellite technology which permitted cable television to bring subscribers numerous programs of news, information and entertainment not available to those without cable television service, thus providing the needed economic support for local origination of programming by the cable media. CCC therefore concluded that it was economically feasible to expand its system, and budgeted funds for that purpose in the Fall of 1978. (Sparkman Tr. March 4, 118:14-19; 123:5-10). CCC decided to allocate money for development of a citywide system, installation of an earth station, expansion of service, and the extension and rebuilding of existing facilities. (Sparkman Tr. March 4, 123:12-122:6).

May 5, 1979 to July 31, 1979: The City recognizes the possibility of open competition in the market raised by CCC's expansion plans and a permit application submitted by a new company, Boulder Communications Company.

The City had expressed interest in having its facilities, particularly the library, connected into the cable system. (Sparkman Tr. March 4, 128:10-15). Due to this interest, CCC wrote the mayor on May 9, 1979, informing her that the existing plant had been extended by one mile with construction

scheduled to proceed further in the summer. The letter informed the mayor that CCC planned to transmit satellite originated programming available only on cable television. (Ex. 6, Tr. March 4, 41:23-24; 42:3).(J.A. 4).

On May 24, 1979, Tim Chaffin, CCC's local manager, met with the library director and the City's designated cable television spokesman, Richard Varnes, to discuss CCC's expansion and the integration of the public library into the system. On May 25, 1979, Varnes wrote Chaffin applauding CCC's expansion plans:[1]

> "It is very exciting to see the system, at long last, moving towards fuller realization of its potential. We look forward to your addition of channels for Home Box Office, Madison Square Gardens, Christian Broadcasting, and the independents you mentioned . . . .
>
> "Thank you again for your time and for your commitment to bringing about a truly active cable system for the Boulder community." (J.A. 11).

Events were radically altered, however, when on July 1, 1979, Boulder Communications Company ("BCC") submitted its application for a permit to serve the City of Boulder with cable television. Significantly, the presence of CCC in the market did not deter BCC from seeking a permit. The letter accompanying the detailed application stated in part:

> "Whatever action the City plans to take in regard to [CCC], it is the plan of BCC to begin building its system as soon as feasible after the City grants BCC its permit." (J.A. 12).

CCC never opposed BCC's request for a permit, and always assumed that it would have to compete with those who qualified for and applied for permits.

While CCC continued its preparations for expanding its system, the submission of BCC's proposal caused the City to reexamine cable television at a City Council study session on July 31, 1979. City officials stated that CCC had complied with its contract with the City (Ex. 28, Tr. July 31, 1979 Study Session, 5:14-16; Tr. March 4, 171:21-24; 172:5), and the City Manager stated that CCC's expansion to date had not caused

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[1] Relying on its permit, CCC continued to develop its Boulder system, investing $900,000.00 by May, 1979—$300,000.00 of which could not be salvaged. (Sparkman Tr. March 4, 124:23-125:2; 126:15-17).

the City any problems (Ex. 28, 12:5-10). In fact, at the time, the City Manager discouraged any thought of impeding CCC's development because he felt CCC "may be acting in the public interest in the sense that they are broadening the offerings to our public without any involvement by us." (Ex. 28 32:20-22).

The submission of BCC's application made the City fully aware of the option for open competition in the market. (Westdyke Tr. March 4, 17:9-20; Ex. 28 8:15-17; 34:24-35:14; Correll depo. 66). Responding to a suggestion that open competition in the cable television market was not practicable, the City's cable television consultant said:

> "Mr. Sample: That may well be the case, but I don't know if we can say so. The economics have changed so dramatically with the advent of the satellite system. Thus it may literally be possible for one, two, three, four operators to operate within the City. In the past it has certainly been the case that in any kind of urban area you would not have been able to support more than one operator.
>
> Council Member Lefferdink: "The satellite is what has changed that; is that correct?" Mr. Sample: "Quite a bit. It's changed the economics quite a bit. And there are other kinds of services that are coming along in the next five or ten years." (Ex. 28, 13:18-14:4).

Although Sample did state that in his view it would be difficult to enter the market once one company had developed a citywide system, he advised the Council that "we may be entering into a period where if there are a couple of franchise holders, they may overbuild each other and compete for services. I can't tell you right now if that's going to happen or not." (Ex. 28, 23:20-24:7). He also advised the Council that it was physically possible to add numbers of additional cables and that the addition of these cables would not be cumbersome to the City. (Ex. 28, 23:20-21; 25:6-10). However, no permit was issued to BCC in July, 1979.

August, 1979 to December 4, 1979: Intense Lobbying By BCC and the City's Desire to Pervasively Control Cable Television Led to a Rejection of Competition In Marketplace.

Subsequent to the July study session, BCC began intensive lobbying of city officials. Denied a permit by the City in July, BCC pressed for revocation of CCC's permit, and for a

moratorium on construction by CCC pending the award of a new permit. Principals of BCC had private meetings not only with City Council members, but with the Mayor, the City Manager and the City Attorney. (Correll depo. 63-64; Danish depo. 15-18; Kerner depo. 100-25, 152-56; 167-78).

During the period of BCC's efforts, the City concluded that open marketplace competition among cable companies for subscribers would deprive the City of the leverage it needed to contractually control cable television and "exact tribute for its favor." (P.A. at A-44). The City was determined not to repeat the failure of its 1972-1974 efforts to replace CCC with a single operator willing to serve the City subject to extensive municipal control by contract. The City selected a request for proposals (RFP) process as the best means of locating the company most amenable to contractual control over such things as programming, rates, and day-to-day business operations.

The concept of true marketplace competition was incompatible with the goal of the RFP process. The cable consultant therefore stated that "competition for the actual cable plant is not conducive to the best public service, to the best entertainment package for the citizens." (Ex. 29, Tr. Nov. 29, 1979 study session, 2:19-22). The City Attorney advised the Council that "we have in this society recognized, especially since the Second World War, that the open competitive mode has some significant disadvantages." (Ex. 29, 37:2-4). The City Manager advised the Council of the perils of open competition, noting that while the strongest competitor might dominate, that competitor may not be the best. (Ex. Z, Tr. Boulder City Council Meeting, December 4, 1979, at 5).

Although the possibility of selecting more than one company following the RFP process was raised, the City's cable consultant recommended starting out with one company. (Ex. 29, 10:21). The City Manager also recognized the possibility that only one permit would be awarded (Ex. 29, 7: 23-24), and he favored an initial award to one principal operator (Ex. 29, 18:11). In sum, it was understood that the process considered by the City would result in the issuance of but one permit. (Ex. Z, 26:6-15). It was also understood that if CCC were unwilling to contractually accept new obligations in the form of amendments to its existing contract, the City would be justified in revoking CCC's permit. (Ex. Z, 33:22-34:2; Ex. 28, 44:21-24; 45:9-12).

In order to justify this retreat from actual marketplace competition, City officials adopted the position that cable television was a natural monopoly and that open competition among firms seeking the same subscribers would be fruitless. Without even attempting to issue multiple permits to promote competition, City officials predetermined that competition *in* the market was very remote (Ex. 29, 26:25) and decided that the only competition that *could* exist in Boulder was competition *for* the market, through a process which allowed City officials, rather than subscribers, to decide which company would, in effect, replace CCC. (Sample Tr. March 4, 207:23-208:4).

To support their predetermination that true marketplace competition was not feasible, City officials relied on a letter from CCC's potential competitor, BCC. On November 28, 1979, Jack Kerner, President of BCC, wrote Mayor Correll about the RFP approach which he had learned the City was considering:

> "If the Council approves a request for bid approach, the existing permit must either be revoked or the permit holder must agree not to expand. If such is not the case, the requst for bid is a sham since no company will bid knowing that TCI is building while it is bidding . . .
>
> "We suggest the City revoke the TCI permit, grant us a new permit consistent with the new policy ordinance and allow us to bring cable service to Boulder. In the event the City were to take this approach, we would purchase the TCI system and maintain service to its subscribers." (J.A. 16).

Adoption of the Moratorium: The City Does By Forced Agreement What It Concedes It May Not Do Under The Police Power.

Since pervasive and monopolistic controls over cable television are not required to protect municipal rights of way, the City Attorney evidently recognized that the police power could not be used to adopt the City's cable television scheme. In a memorandum submitted to the Council, the City Attorney advised the Council that an ALR annotation [41 ALR 3d at 284] and a Colorado PUC decision issued in 1968 (P.A. at A-70) had concluded that cable television was not a natural monopoly. The memo also quoted from that section of the PUC

decision which had concluded that cable television was not a public utility and that state legislation was required to afford a basis for anticompetitive regulation of cable television in Colorado. (J.A. 20).

The memo then turned to the effect of *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978), on the City's contemplated action. Although characterizing this Court's test as "quite vague," the City Attorney stated that "The *City of Lafayette* decision requires that an explicit state policy to displace competition with regulation or monopoly public service be shown prior to a recognition of the [antitrust] immunity." (J.A. 22). After citing to a memo prepared by the Colorado Attorney General, the City Attorney stated:

> "[T]hus, the scope of regulation permitted by the City's control over access to the public rights of way may be restricted, just as the City's power to regulate competition is restricted under the *City of Lafayette* case, to the extent that the state law has delegated responsibility to home rule cities to regulate cable communications." (J.A. 24).

The City Attorney, however, found a way out of what could be interpreted as a prohibition against anticompetitive arrangements and the unilateral imposition of controls beyond those justified by the police power. Pointing to a 1968 Illinois case, the City Attorney observed:

> "On the other hand, these procedural objections may be overcome by the use of non-exclusive contractual undertakings (*See*, e.g., *Ill. Broadcasting Co. v. City of Decatur*, 238 N.E.2d 261 (Ill.App. 1968), which held that even though many of the conditions of the cable communications ordinance could not be imposed by the City, the grantee could agree to them." (J.A. 22).

The City Attorney therefore concluded that the City could exact concessions beyond those warranted under the police power by conditioning the use of the public right-of-way upon contractual undertakings by a company selected through a bid process. CCC's compliance with a moratorium could be obtained in the same way:

> "[I]n the event that TCI is unwilling to accept a moratorium, the same purpose can be achieved with a greater measure of legal certainty by revoking the existing permit and granting a new permit, which, upon acceptance

of TCI by performance, would permit TCI to continue to operate in the area in which it now operates with its current cable communications system." (J.A. 24).

On December 4, 1979, the City Council decided against simply issuing additional permits under the police power. Instead, the Council adopted a resolution directing City staff to draft a model ordinance (*i.e.*, a cable television contract) which would serve as a basis for an RFP process as well as other ordinances imposing a ninety day moratorium on CCC's efforts to expand its offerings and area of service as it was contractually entitled to do. (Ex. Z, 50:17-22).[2]

The city staff did prepare a draft model cable television agreement which would impose numerous obligations on the company issued a permit following the RFP process. Although the City refers to the draft agreement as "regulation," it in fact far exceeds the scope of any legitimate police power concern, as the City's desire to exact concessions from and pervasively control a chosen cable television disseminator.[3]

On December 18, 1979, the City Council was presented with two ordinances proposing a moratorium on CCC's expansion. The City Attorney advised the Council:

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[2] Throughout the litigation, the City has maintained that its consideration and eventual adoption of a moratorium was pro competitive in character. The City has repeatedly referred to statements in the Council sessions of City officials expressing concern that competition would be foreclosed by CCC's unfettered expansion. Petitioner emphasizes that the "competition" contemplated by these officials was competition for the right to engage in the cable television business in Boulder, not competition in the marketplace for subscribers. (P.A. at A-32). Moreover, the City has never really explained why it was foreclosed from granting an additional permit to BCC in July, 1979.

[3] Among the features of the proposed contract were: The City's right to purchase the cable company at a price excluding any goodwill but limited to depreciated investment in plant (Section 4[c]); the right of prior approval of every contract to be executed by the company (Section 4[c][3]); rate regulation (Section 5); the right to change rates at any time regardless of prior agreement on a rate schedule (Section 5[b]); a 5% franchise fee (Section 6[a]) which is two and one-half times higher than the present fee; a requirement that the company provide five leased access channels (Section 7[d]); a complaint procedure monitored by the city manager which includes a liquidated damage provision (Section 8[a][d]); a requirement that the company upgrade its facilities continually to state-of-the-art conditions (Section 7[d]); and finally, a requirement that at specified intervals during the contract term certain obligations of the company are to be renegotiated, including rate structures, free or discounted service, services provided and programming offered, and human rights (Section 8[c]). (J.A. 31-51).

> "I do not believe that the city enjoys *Parker* immunity in this case under the *City of Lafayette* decision .... I do not personally see an immediate anti-competitive impact, although, there is clearly a restraint of trade at issue." (Ex. A-1, Tr. Dec. 18, 1979 City Council Meeting, 4:24-5:7; Tr. March 6, 5:21-22; 6:19-20).

The Council then enacted two moratorium ordinances; Ordinance 4472 repealed and reenacted CCC's permit with added sections restricting CCC to areas then served for a period of ninety (90) days. Imposing the restriction by contract, Section 12 of the Ordinance stated:

> "The Grantee shall signify its acceptance of the terms hereof by continuing to provide service to any customers presently served by the Grantee." (P.A. at A-55, A-60).

Ordinance 4473 was an emergency ordinance immediately limiting CCC's use of City rights-of-way to areas of the city served on December 18, 1979. (P.A. at A-62).

On January 15, 1980, CCC filed its complaint in the Court below, alleging violations of antitrust laws, CCC's First Amendment rights, and rights guaranteed to it by state law. CCC informed the City that it considered the ordinances invalid, and that it would continue its development work. The City responded by filing criminal complaints against CCC and its contractors. Thereafter, on February 4, 1980, the City filed a state court action for injunctive relief. (*City of Boulder* v. *Community Communications, Inc.*, Boulder District Court No. 80-CV-0198). On February 6, 1980, the State District Judge denied the City's request for injunctive relief, pointing out that the federal court already had assumed jurisdiction and that, in any event, the City had not convinced him that it would prevail on the merits, that significant First Amendment issues were presented, and that the equities favored CCC. (Ex. 20; Tr. March 4, 170:2, 21).

The City nevertheless resorted to self-help, and began destroying CCC's cable. Under duress, CCC agreed to stop building pending judicial action, and petitioned the federal district court for injunctive relief.

The Injunction Hearing

On March 4, 1980, the District Court below commenced preliminary injunction proceedings to determine whether the City should be barred from interfering with CCC's plans to

expand its programming and audience in Boulder, Colorado. The trial court heard live testimony from eight witnesses and had available the transcripts and tapes of City Council sessions and several hundred pages of deposition testimony. Following that testimony, there was extensive oral argument. (Tr. March 6, 65 *et seq.*).

The City Manager testified that open competition would have been possible (Westdyke Tr. March 6, 17:9-18:15), but that it was not considered desirable because competition might favor the strongest cable disseminator rather than the one the City deemed "best." (Westdyke Tr. March 6, 29:12-16, 32:21-33:3). The City's consultant shared this view. (Sample Tr. March 4, 183:22-185:7; 207:5-14).

As the respondent notes, a witness for the City, Carl Pilnick, did testify that in his view cable television was a natural monopoly. *See* Opposition to Petition for Certiorari, at 6 n. 10 ("Opp. Br." herein). He based his conclusion on what he perceived to be physical and economic barriers to competition. Mr. Pilnick's assumptions were, however, controverted by other evidence. For example, the court learned that a device known as an F Cable Arm allowed multiple cables to be unobtrusively installed. (Olsen Tr. March 6, 55:7-57:9.).

Mr. Pilnick also testified that costs to a second cable operator to rearrange utility lines might be much greater than that borne by the first, thus precluding competition. However, Mr. Pilnick had never been to Boulder. (Pilnick Tr. March 5, 124:4-18). CCC's construction coordinator, Nicholas Olsen, had toured Boulder and reviewed configurations for each of the 3,924 utility poles in Boulder (Olsen Tr. March 6, 49:22-25; 51:1-5; 60:24-25; 63:18-19), and determined that the actual cost to the second operator would be approximately the same as that borne by CCC (Olsen Tr. March 6, 57:20-22; 59:24-60:24).

On the subject of economic barriers, the trial court had before it the 1968 decision of the Colorado Public Utilities Commission which doubted that cable television was a natural monopoly and concluded that, in the absence of state legislation, cable television should be treated like any other business, i.e., issued a routine business license and allowed to compete for subscribers with other suppliers of cable television programming, no two of which are the same. (P.A. at A-87 to A-88).

The trial court also had before it comments given to the City Council by its cable consultant which expressed doubt as to whether cable could be classified as a natural monopoly, noting that "the economics have changed so dramatically with the advent of the satellite system" that "it may literally be possible for one, two, three, four operators to operate within the City." (Ex. 28, 13:19-22). Mr. Sample had also advised the Council that "we may be entering into a period where if there are a couple of franchise holders, they may overbuild each other and compete for services." (Ex. 28, 23:20-24:7). Mr. Pilnick also testified about the effect of satellite technology on competition.

> "I think that with the penetration getting higher in general because of new services, then the possibility of more than one cable company in a market is becoming more real now than it was before, yes I would agree with that." (Pilnick Tr. March 5, 105:21-24).

On March 17, 1980, the District Court issued its Memorandum Opinion and Order. After reciting the events leading to the imposition of the moratorium, the court focused on antitrust concerns and, in particular, whether "Boulder's action in imposing the moratorium [was] an unlawful interference with the plaintiff's business and with free market competition?" (P.A. at A-40). Although erroneously reading *City of Lafayette* as a case simply restricting *Parker v. Brown,* 317 U.S. 341 (1943), to governmental actions of both state and local governments, the court made several critical findings of fact. First, it found that actual competition in the modern cable television marketplace is possible and will probably materialize if cities do not prevent it:

> "I disagree that the evidence shows that cable television is such a natural monopoly that the only feasible competition is in the process of currying favor with the City Council to obtain a permit to operate. To the contrary, the evidence is that there can be competition in the marketplace, with the choice of price and service left to the consumers." (P.A. at A-43).[4]

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[4] Facts relating to the "natural monopoly" issue have been included here because the City has fixated on the issue, and raised a false alarm which may have influenced the Tenth Circuit. *See, e.g.* Opp. Br. at 38 n.4; 4-6 & nn. 10-11. However, the City's natural monopoly "argument is today simply fallacious" (P.A. at A-18; Markey, J., dissenting), as the trial court expressly found as a matter of fact. (P.A. at A-43). This factual issue should not be

(footnote continued on following page)

The trial court also found that the City's true interest was not police power regulation, but contractually negotiating benefits such as "better" programming, free service for public buildings, and greater cash payments.[5] The court therefore found that the City's actions had a proprietary motivation, thus precluding *Parker* state action immunity. It also found that the 90 day moratorium was part of a market allocation scheme, designed to preserve a virgin market so it could be awarded on monopoly terms. The trial court thus granted a preliminary injunction to preserve the *status quo* and prevent irreparable harm to CCC and the viewing public.

The Tenth Circuit Appeal

The District Court's March 17, 1980, injunction order was handed down on the 89th day of the moratorium. The City had received all responses to its request for proposals, and CCC had

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(footnote continued from preceding page)
retried to this Court. The "natural monopoly" argument is irrelevant to the questions presented to this Court for decision—whether *Parker* extends blanket immunity to home rule cities and to all other non-commercial municipal conduct. The exemption issues which the Court is asked to resolve do not require consideration of the sufficiency of the City's "natural monopoly" defense as a bar to eventual liability premised on the City's admitted restraint of trade. No doubt further evidence will emerge at trial on this issue should petitioner prevail in this Court.

It must also be stressed that, even if valid, the natural monopoly argument totally fails to justify anticompetitive conduct, and is irrelevant to immunity issues. The correct phrase for a "natural monopoly" is "thin market." L. Sullivan, HANDBOOK OF THE LAW OF ANTITRUST, § 45, at 115 (1977) (a thin market is a market which will support only one supplier). The City essentially argues that it should be allowed to determine in advance that a market is a thin market, and then should be allowed to designate the monopolist. Both actions would be illegal under the antitrust laws. Whether a thin market exists can only be determined by the free play of competitive forces. *See, e.g., Union Leader Corp. v. Newspapers of New England, Inc.*, 284 F.2d 582 (1st Cir. 1960). Even if a municipal predetermination of thin market status was not illegal, the City still could not designate a monopolist. The antitrust laws require that an "elimination bout" determine who the supplier shall be in a thin market, which cable television is not. *Id.* at 584 n.4.

[5] P.A. at A-42. The City apparently planned to create *de facto* monopoly privileges in exchange for such benefits. The City has tried to characterize CCC as a *de facto* monopolist, but in fact the City alone is responsible for the present marketplace conditions. CCC rejects the notion of restraining trade in the cable television market, whereas the City has used its control over access to the market and to essential facilities (the public rights-of-way) to preclude competition in favor of a veritable auction of a monopoly to the highest bidder. This runs counter to established antitrust doctrine. *See, e.g., Hecht v. Pro Football, Inc.*, 444 F.2d 931 (D.C.Cir. 1971), *cert. denied* 404 U.S. 1047 (1971).

not done any meaningful development work during the moratorium. (Ex. B-1 through E-1, Tr. March 6, 5:23-6:13; 6:18-20). An appeal was nonetheless taken, even though the moratorium was allegedly a temporary, one-time affair, and the City Attorney had advised the Council that the imposition of a moratorium after the receipt of bids would be "extremely dangerous" (J.A. 24), and had emphatically denied any intention to revoke CCC's permit (deRaismes Tr. March 6, 90:23-91:2). Following an extremely expedited briefing schedule, the Court of Appeals heard oral argument on May 9, 1980.

On May 28, 1980, the Tenth Circuit majority reversed the preliminary injunction order. Focusing on the immunity issue, the majority disagreed with the trial court's finding that the City's moratorium was designed to facilitate a bargaining strategy, and thus involved proprietary conduct. It concluded instead that similar contractual control over cable television must have existed in the Colorado home rule city of Vail, and that such control is inoffensive because the Colorado Supreme Court did not discuss the issue when deciding a case involving other cable television issues and Vail. See *Manor Vail Condominium Ass'n v. Town of Vail*, 604 P.2d 1168 (1980). The Tenth Circuit construed this silence as implied Colorado Supreme Court approval of what the City of Boulder had done. The Tenth Circuit also inferred from *Manor Vail* that cable television involved only matters of purely local concern, contrary to the trial court's express finding of fact. The Tenth Circuit thus held that Boulder's actions were governmental in character and, since dealing with a matter of local concern, were to be treated as actions of the State entitled to antitrust immunity under *Parker*. The Tenth Circuit explicitly recognized that there was no state legislation or other policy regarding cable television, but treated this fact as mandating, not denying, the grant of immunity. (P.A. at A-7).

The Tenth Circuit also confined *City of Lafayette* to cases where cities are "in the . . . business" (P.A. at A-6), and found that the City had complied with *California Retail Liquor Dealers' Association v. Mid-Cal Aluminum, Inc.*, 445 U.S. 97 (1980), because Boulder's own policy in effect represented a "state" policy to displace competition which the City itself had actively supervised by enforcing the moratorium.

On July 1, 1980, Chief Judge Howard T. Markey of the United States Court of Customs and Patent Appeals, sitting by

designation, filed his dissent. (P.A. at A-10 to A-35). Although emphasizing First Amendment issues which had been raised by CCC, the dissent also found no basis for antitrust immunity in the absence of any state policy to displace competition:

> "No state policy whatsoever exists in relation to cable TV. The subject is not mentioned in Colorado's constitution or in any state statute. The Colorado Public Utilities Commission has declined to exercise jurisdiction over cable television. [Citation to PUC Decision 70749, A-70.] With no policy whatever on regulation of cable TV, by cities or otherwise, it can hardly be said that Colorado has a state policy 'to displace competition' in cable TV with regulation or monopoly public service. Much less can it be said that Colorado has a comprehensive, clearly articulated, affirmatively expressed, actively state supervised anti-competitive policy for cable TV." (P.A. at A-26 to A-27).

The dissent also viewed the City's post-moratorium decision to appeal as an ominous indication of future activity.[6] Notwithstanding the City Attorney's statement in open court that districting would be "injurious" (DeRaismes Tr. March 6, 102:9-19), Judge Markey's fears were soon realized. Following the majority's decision, the City enacted two successive moratorium ordinances and thereafter, on July 22, 1980, enacted Ordinance No. 4515 which divided the City into two districts, permanently restricting CCC to one-third of the City. (J.A. 69). On September 5, 1980, the District Court preliminarily enjoined enforcement of this new districting scheme on the ground that it violated the First Amendment and was too

[6] "Nor is CCC likely, under the city's plan, ever to speak again outside its present area. The city, after receiving the majority opinion, signaled its intent to impose a second moratorium. In its briefs here it repeated, ad nauseam, that its 90-day moratorium was merely 'a one-time, temporary' delay in CCC's expansion. The city refused, however, to assure Judge Matsch that it would not impose second and continuing moratoriums if he denied the injunction. The city appealed the injunction interlocutorily, and moved to expedite, even though the moratorium expired the day after the injunction issued. Moreover, a failure to impose continuous moratoriums might, as the city elsewhere argues, allow CCC to 'wire the entire city' and thus defeat the city's plan to grant either one monopoly for the entire city, or a number of monopolies, each in a specified district. Hence, the city must either abandon its present plan or it must continue to impose moratoriums on CCC's right to speak outside its present area." (P.A. at A-17).

proprietary to be exempt from the antitrust laws, even under the Tenth Circuit ruling now before this Court. (Opp. Br. at 1a-12a).[6a]

SUMMARY OF ARGUMENT

The Tenth Circuit's decision in this case creates automatic and virtually blanket antitrust immunity for local governments. In essence, the Tenth Circuit held that the antitrust laws only apply when a non-home rule entity is actually engaged in business operations. The Tenth Circuit apparently ruled as it did for several reasons.

First, it reached several conclusions about Colorado state law which must be addressed initially because they underlie much of the Tenth Circuit's immunity analysis. The Tenth Circuit felt that Colorado home rule cites are unique in that only they can adopt laws applicable to matters of purely local concern. From this, the court reasoned that there would be no applicable law at all if the city could not act. To avoid this type of void, the Tenth Circuit concluded that Colorado home rule cities must be sovereigns capable of announcing state policy on their own, since they were the only source of policy under the state constitution. The Tenth Circuit also noted Colorado state cases where home rule cities had adopted laws relating to cable television, and thus concluded that cable television must be a matter of purely local concern, and that Boulder's market allocation plan must be lawful under state law.

These conclusions about Colorado state law are uniformly erroneous. Cable television is not a purely local matter. Even if it were, home rule cities do not have exclusive authority over purely local affairs; the state can also adopt applicable policies, and they will apply to purely local matters if a home rule city declines to supersede the state's policy. Accordingly, there is no policy void; it has been expressly held that home rule cities do not declare state policy. They are not city-states with their own sovereignty for federalism purposes. Lastly, Boulder's actions are not lawful under state law. A recent Colorado case involving a moratorium on a cable television competitor for the purpose of replacing one competitor with another has ruled that such actions are illegal under state law.

[6a] On May 12, 1981, the same Circuit Judges who heard the first appeal, plus Senior District Judge Luther L. Bohanon, sitting by designation, heard oral argument in the Second Appeal. On May 15, 1981, the panel ordered CCC to suspend development work pending a decision, but also left the preliminary injunction in effect.

In addition to its erreonous application of state law, the Tenth Circuit ruled as it did because: (1) it considered "governmental" city actions exempt because *City of Lafayette* is limited to proprietary conduct; and (2) it considered general home rule authority to manage local affairs to be a sufficient statement of state anticompetitive policy under *City of Lafayette* standards.

It is submitted that general grants of authority do not constitute any form of articulated state policy to displace competition, let alone a statement of policy which satisfies *City of Lafayette* standards. In the antitrust realm, the implied state action exemption cases are grounded in federalism, and represent a balance between federalism and important national antitrust goals. This balance does not require antitrust policy to be subordinated to anything less than a true, valid state decision to displace competition in a given market.

In light of the fact that *City of Lafayette* reflects a federalism rationale, it is also submitted that the proprietary-nonproprietary distinction is simply irrelevant to a state action exemption inquiry. The issue is whether a given anticompetitive action reflects clear state policy. Without such a policy mandate, actions by entities other than the state are not exempt from the antitrust laws, regardless of whether they are "proprietary" or "governmental." It is thus apparent that the Tenth Circuit erred when it decided to grant immunity for a local "governmental" act unsupported by any state policy.

Several policy considerations also indicate that broad municipal antitrust immunity should be denied. The "public service" and impairment-of-local-autonomy arguments are erroneous, and have largely been rejected by this Court. In addition, broad immunity would cause severe economic dislocation and pervert federalism by allowing cities to even overrule state procompetitive policy. Confusion would also be created by use of the vague proprietary-governmental distinction, or by use of equally vague distinctions between types of local government, as a basis for determining when antitrust immunity exists. The indications are that *City of Lafayette* generated social benefits through increased competition, and that the problems which concerned the dissent have not materialized. *City of Lafayette*'s standards should thus be retained, and applied in this case to reverse the Tenth Circuit.

ARGUMENT

I.

INTRODUCTION: SCOPE OF APPEAL IS LIMITED.

This appeal is limited in scope. As the Tenth Circuit noted, the issue on appeal "is whether the City is exempt from the antitrust laws." (P.A. at A-2). The Tenth Circuit reversed "as a matter of law" because it concluded that Boulder was immune from antitrust liability under the facts of this case. (P.A. at A-9). Accordingly, this appeal presents a narrow but significant question of law: Whether, on the facts of this case, Boulder is immune from the antitrust laws as a matter of law? Petitioner contends that the Tenth Circuit's affirmative answer to this question is incorrect if the controlling legal standards are properly understood and correctly applied to the facts as found by the trial court.

II.

THE TENTH CIRCUIT'S CREATION OF BROAD MUNICIPAL ANTITRUST IMMUNITY IS NOT JUSTIFIED UNDER STATE ACTION EXEMPTION STANDARDS, OR UNDER THE FACTS OF THIS CASE.

A. Since This Court's Decisions Applying *Parker v. Brown* have Defined the Relevant Legal Standards in Terms of Federalism, A Valid State Policy is Required.

Any discussion of the legal standards relating to state action immunity should begin with the various broad antitrust principles which guide analysis in this area. A threshold principle is that the antitrust laws represent a national pro-competition policy of paramount importance. *City of Lafayette*, 435 U.S. at 398; *United v. Topco Associates*, 405 U.S. 596, 610 (1972). Accordingly, this policy is "the polestar by which all must be guided" when they engage in conduct which impacts on competition. *City of Lafayette*, 435 U.S. at 406. This congressionally mandated free-market policy even prevails over other social goals to the extent that such goals are anticompetitive. *See, e.g., National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978).

In keeping with these guiding principles, this Court has always recognized a "heavy presumption against implicit exemptions" from the antitrust laws. *Goldfarb v. Virginia St. Bar*,

421 U.S. 773, 787 (1975); *City of Lafayette*, 435 U.S. at 398. The message is clear: antitrust policy is a positive feature of our laws, and not some form of limitation to be circumvented if at all possible.

Consistent with the favored role played by the antitrust laws, this Court has only recognized two implied exemptions[7], and then only in situations where it was necessary to do so to accommodate other "overriding" interests. *City of Lafayette*, 435 U.S. at 399-400. However, these two implied antitrust exemptions are applied narrowly and are not extended beyond what is necessary to serve the overriding interest which initially justified the exemption.[8]

This case involves the state action immunity first recognized in *Parker v. Brown*, 317 U.S. 341 (1943). This state action immunity flows from the federal nature of our "dual system of government." *City of Lafayette*, 435 U.S. at 400. Under *Parker's* federalism rationale, the 50 states are entitled to some federal deference in the area of economic policy because they are sovereign in their own right. *See, e.g., Bates v. State Bar of Arizona*, 433 U.S. 350, 361-62 (1977). However, "state action" in the *Parker* sense is much narrower than the state action notion in other contexts.[9] Applying the narrowed federalism concept of *Parker*, this Court has concluded that the proper balance between national antitrust policy and state sovereignty is to enforce the antitrust laws unless a state policy clearly expresses an affirmative decision by the state, acting

[7] *Eastern Railroad Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965); *Parker v. Brown*, 317 U.S. 341 (1943). These two implied exemptions are discussed in *City of Lafayette*, 435 U.S. at 399-400.

[8] For example, this Court has described the *Parker* holding as "narrow," and confined the state action immunity to governmental acts of the state acting as sovereign. *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 590-91 (1976).

[9] A passage from the *Cantor* case is illustrative:

> Unquestionably the term "state action" may be used broadly to encompass individual action supported to some extent by state law or custom. Such a broad use of the term, which is familiar in civil rights litigation, is not, however, what Mr. Chief Justice Stone described in his *Parker* opinion. He carefully selected language which plainly limited the Court's holding to official action taken by state officials. 428 U.S. at 590-91 (footnotes omitted).

governmentally as sovereign, to displace competition. *Bates*, 433 U.S. at 361-62.

This federalism rationale provides the touchstone for evaluating when state action immunity is available to entities other than the state itself acting as sovereign. This touchstone reveals that such entities have no state action immunity of their own, because in the antitrust realm there is simply no federalism-based justification for extending immunity beyond the state itself acting as sovereign. Federal deference is only warranted when there is a clash between true state anticompetitive policy and congressional policy; federalism does not require deference to local anticompetitive policy independently originated by a city.[10] Absent the type of clear state policy which justifies subordination of federal free-market goals, national policy obviously applies, and the thousands of municipalities in this country "must obey the antitrust laws." *City of Lafayette*, 435 U.S. at 416.

This Court has never lost sight of *Parker*'s roots. The state action exemption cases have therefore required *state* policy, and have articulated the kind of state policy which will bring federalism issues into play in the antitrust area. *Goldfarb* reiterates that activity which is not "required by the State acting as sovereign" is not a sufficient expression of state policy to warrant federal deference. 421 U.S. at 790. Therefore, even though the Virginia State Bar was admittedly "acting within [the] broad powers" given to it by the state, *City of Lafayette*, 435 U.S. at 410, and even though its action may have been "prompted" by the state, immunity did not exist because the restraint at issue had not been "compelled by direction of the State acting as sovereign." *Goldfarb*, 421 U.S. at 791.

In *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579 (1976), this Court reacknowledged *Goldfarb*'s state direction requirement, *id.* at 600, and reiterated that issues of federalism for antitrust purposes only arise if an affirmative policy of the state *qua* state is involved. *Id.* at 591 ("there is no claim that any state action violated the antitrust laws").

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[10] Lower courts have reached the same conclusion about home rule cities: "However 'sovereign' home rule cities . . . may be [under state law], they nonetheless carry the status of municipalities so far as federalism is concerned." *Woolen v. Surtan Taxicabs, Inc.*, 461 F.Supp. 1025, 1032 (N.D. Tex. 1978).

In *Bates*, however, this Court did confront a case where the "claims are against the State." 433 U.S. at 361.[11] The state attorney-advertising restriction involved in *Bates* was found to be "so clearly and affirmatively expressed and . . . the State's supervision . . . so active," that federal deference was deemed necessary to avoid a clash between congressional policy and a particular anticompetitive policy of the state acting as sovereign. *Id.* at 362.

In *City of Lafayette*, this Court confronted municipal anticompetitive action which was taken pursuant to broad general authority from the state to operate a municipal utility. *City of Lafayette* involved a claim by two cities that they were exempt from the antitrust laws under *Parker* by reason of their governmental status alone. Rejecting that claim, this Court again reiterated that antitrust immunity can only arise if the state, acting as sovereign, adopts a specific anticompetitive policy which meets the standards for immunity set forth in *Parker*, and if the state has purposefully decided that it wants to use its local governments as a vehicle for implementing said policy. 435 U.S. at 413. If a city acts pursuant to such state policy, it will not be liable under the antitrust laws. Under such circumstances, however, immunity is consistent with *Parker's* federalism rationale, because it is state rather than local policy which is immunized. In *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), this Court repeated that an unequivocal and active *state* anticompetitive policy is a prerequisite to federal deference.

It is this narrowed federalism concept which determines whether a city is exempt from antitrust enforcement. Varying phrases are used in *City of Lafayette* to describe the test for municipal immunity,[12] but when the case is viewed in its

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[11] *Bates* involved an attorney disciplinary rule imposed and enforced by the Arizona Supreme Court, the "ultimate body wielding the State's power over the practice of law." 433 U.S. at 360. Accordingly, the rule expressed statewide policy of the sovereign, not the local policy of a municipality.

[12] The following language is found in the plurality and concurring opinions in *City of Lafayette*:

> The *Parker* doctrine exempts only anticompetitive conduct engaged in as an act of government by the State as sovereign . . . pursuant to a state policy to displace competition with regulation or monopoly public service.

435 U.S. at 413.

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entirety, uniform guidance emerges. Due to the federalism basis of *Parker,* and the importance of our national antitrust policy, antitrust immunity for local governments only exists if the state as sovereign consciously decides to displace competition in a particular market, affirmatively evidences this decision with a substitute economic policy of its own, and expressly allows or requires its municipalities to operate pursuant to such policy. No two authors would use the same words to articulate this standard,[13] but the meaning is clear. If there is no underlying state policy sufficient to qualify for immunity under *Parker,* or if a municipality may nonetheless "express its own preference, rather than that of the State," there is no city exemption from the antitrust laws on the basis of federalism. *City of Lafayette,* 435 U.S. at 414.

B. This Case Involves no State Anticompetitive Policy Whatever: The Tenth Circuit Totally Misapplied the Relevant Legal Standards.

The Court of Appeals below acknowledged that this case involves "City action in the absence of any regulation whatever

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> [M]unicipalities are "exempt" from antitrust enforcement when acting as state agencies implementing state policy to the same extent as the State itself. . . .

Id. at 412 n.42.

> [I]n the absence of evidence that the state authorized or directed a given municipality to act as it did, the actions of a particular city hardly can be found to be pursuant to "the state['s] command," or to be restraints that "the state . . . as sovereign" imposed.

Id. at 414.

> [A]n adequate state mandate for anticompetitive activities of cities . . . exists when it is found 'from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of. The *Parker* doctrine, so understood, preserves to the States their freedom under our dual system of federalism to use their municipalities to administer state regulatory policies . . . without at the same time permitting purely parochial interests to disrupt the Nation's free-market goals.

Id. at 415-16.

> [*Parker* will not support] a State's desire to insulate anticompetitive practices not imposed by it as an act of government. . . .

Id. at 416.

> [T]he *threshold inquiry* in determining if an anticompetitive activity is [immune] is whether the *activity* is required by the State acting as sovereign. . . . *Id.* at 425 (Burger, C.J., concurring).

[13] In other words, the various passages from *City of Lafayette* quoted above obviously do not constitute separate "tests" which can be played off against one another in an effort to circumvent the antitrust laws.

by the State. . . . [The city policy] here concerned was the only control or actual supervision exercised by state or local government, and it represented the only expression of policy as to the subject matter." (P.A. at A-6 to A-7). Accordingly, absolutely no issue of federalism in the *Parker* or *City of Lafayette* sense was present. When no issue of federalism is present, there is simply no basis for applying *Parker*. Notwithstanding this fact, the Tenth Circuit invoked *Parker* and recognized broad antitrust immunity for local governments under the facts of this case. Significantly, the Tenth Circuit's decision accords Boulder the right to "express its own [anticompetitive] preference" independent of and even in derogation of explicit, procompetitive state policy. This result is "a perversion of federalism." *City of Lafayette*, 435 U.S. at 416.

The Tenth Circuit majority had two alternative grounds for its decision to broadly immunize local governments from the antitrust laws. First, it simply considered *City of Lafayette* inapposite on the ground that *City of Lafayette* allegedly only applies to a city's "proprietary" actions, and that so called "governmental" actions are immune if they satisfy the "*Parker-Midcal* doctrine." (P.A. at A-9). Second, the Tenth Circuit concluded that, even if *City of Lafayette* does apply, the "statement of [state] policy requirement" is met when a state has a home rule provision which authorizes municipalities to manage their own affairs under a home rule charter. (P.A. at A-8). Proper analysis, starting with home rule in Colorado, reveals the manifest error in the Tenth Circuit's decision

C. There is no Clash of State and Federal Law: Application of the Antitrust Laws to Enjoin Anti-Competitive Municipal Conduct in This Case Did Not Void Local Governmental Action Which Otherwise Would Have Been Valid Under Local Law

Despite "the absence of any regulation whatever by the State of Colorado" (P.A. at A-6), the Tenth Circuit majority nonetheless granted state action immunity to the home rule city of Boulder, Colorado. The City apparently argues that it should have immunity of its own because, as a home rule city, it will never be able to take advantage of state policies. This entire argument is based on the proposition, which the Tenth Circuit accepted, that Colorado home rule cities have "*exclusive*

authority as to matters of local concern." *See, e.g.*, Opp. Br. at 18, 24 (emphasis added). In fact, no home rule city—not even a Colorado home rule city—has any form of exclusive authority.

The Tenth Circuit's analysis of Colorado law was, simply, incorrect. Settled Colorado law establishes that only the General Assembly can promulgate state policy and that Colorado's home rule cities are not equated with the state even when acting in matters of purely local concern. The authority of Colorado's home rule cities over local matters is, therefore, not "exclusive."

1. Colorado Law Does Not Regard Each Home Rule City As A Separate, Sovereign State, Capable of Announcing State Policy.

The Tenth Circuit stated that because Colorado's home rule cities derive their authority directly from the state constitution, their authority is not "delegated";[14] thus, they express

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[14] Respondents contend that the powers of Colorado home rule cities are unique in that the powers are derived from the state constitution and grant to home rule cities "exclusive authority as to matters of local concern." (Opp. Br. at 24). This contention is fallacious and misleading on a crucial issue. Colorado home rule powers are similar to those found in many other states. The Tenth Circuit decision would have broad application, particularly where, as here, the state legislature has not articulated any policy to displace competition. Thus, the Panel's reasoning would give antitrust immunity to cities in many other states, including all of the other five states in the Tenth Circuit.

Like Colorado's home rule cities, home rule cities in Arizona, California, Connecticut, Nebraska, New Mexico, Ohio, Oklahoma and Oregon may pass ordinances superseding state legislation on matters of purely municipal concern. *City of Tucson v. Arizona Alpha of Sigma Alpha Epsilon*, 67 Ariz. 330, 195 P.2d 562 (1948); *Sonoma County Organization of Public Employees v. County of Sonoma*, 23 Cal.3d 296, 152 Cal.Reptr. 903, 591 P.2d 1 (1979); *Caulfield v. Noble*, 178 Conn. 81, 420 A.2d 1160 (1979); *City of Omaha v. Lynch*, 181 Neb. 810, 151 N.W.2d 278 (1967); *Apodaca v. Wilson*, 86 N.M. 516, 525 P.2d 876 (1974); *Canada v. Phillips*, 168 Ohio St. 191, 151 N.E.2d 722 (1958); *Lee v. Norick*, 447 P.2d 1015 (Okla. 1968); *Heinig v. City of Milwaukie*, 231 Ore. 473, 373 P.2d 680 (1962).

Respondents have contended that the local autonomy of home rule cities in New Mexico and Oklahoma is restricted and subject to control by the legislatures. (Opp. Br. at 24). The case of *Apodaca v. Wilson, supra*, refutes this contention as to New Mexico. Article X, § 6 of the New Mexico Constitution provides that "[a] municipality which adopts a charter may exercise all legislative powers and perform all functions not expressly denied by general law or charter." The New Mexico Supreme Court held in *Apodaca*

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state policy when exercising their complete authority over local affairs. The Colorado Supreme Court, however, has taken a contrary position. In *City and County of Denver v. Sweet*, 138 Colo. 41, 329 P.2d 441 (1958), the Colorado Supreme Court observed:

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that " 'general law' can only be interpreted to mean a law which applies generally throughout the state, or is of statewide concern as contrasted to 'local' or 'municipal' law" (525 P.2d at 881). Therefore, in all matters of local concern, the city has complete control.

In *Lackey v. Grant*, the Oklahoma Supreme Court interpreted Okla. Const. art. XVIII, § 3(a) to mean that:

> "The people of the state, in the exercise of their sovereign power and by means of organic law, have delegated to the inhabitants of cities having a population of more than 2,000 inhabitants the power to be exercised by such inhabitants at their option to frame a charter for their own local government, which is to become the organic law of such government, and is to supersede the laws of the state in conflict therewith, insofar as they attempt to regulate merely municipal affairs." (116 P. at 915-916).

This view has become established in Oklahoma. *See City of Ponca City v. Edwards*, 460 P.2d 418, 420 (1969). In addition to these powers, California and Arizona home rule cities may legislate on matters of statewide concern as long as the field involved has not been preempted by state legislation. *Bishop v. San Jose*, 1 Cal.3d 56, 81 Cal.Reptr. 465, 460 P.2d 137 (1969) (although case finds preemption); *Tucson v. Arizona Alpha of Sigma Alpha Epsilon*, *supra*. California and Arizona cities may therefore have greater autonomy than Colorado cities.

Similar to the "local" v. "statewide" standard of the above states, fourteen states use a "local law" v. "general law" standard. If the state legislation is applicable only to a particular city, it is "local" or "special" legislation, and the city charter provisions (and city ordinances in eight of these states) will supersede the state legislation. (*Lee v. City of Jesup*, 222 Ga. 530, 150 S.E.2d 836 (1966), *cert denied.*, 386 U.S. 992 (1967); *Hawaii Govt. Employees Ass'n v. County of Maui*, 59 Haw. 65, 576 P.2d 1029 (1978) (holding based upon constitutional provision applying equally to cities and counties); *Bagley v. Gilbert*, 63 Idaho 494, 122 P.2d 227 (1942); *Claffin v. Walsh*, 212 Kan. 1, 509 P.2d 1130 (1973); *State's Atty. v. City of Baltimore*, 274 Md. 597, 337 A.2d 92 (1975); *Birge v. Town of Easton*, 274 Md 635, 337 A.2d 435 (1975); *Board of Appeals of Hanover v. Housing Appeals Com.*, 363 Mass. 339, 294 N.E.2d 393 (1973) (involving general law which did restrict city ordinance); *A.C.E. Equipment v. Erickson*, 277 Minn. 457, 152 N.W.2d 739 (1967); *Inganamort v. Borough of Fort Lee*, 62 N.J. 521, 303 A.2d 298 (1973) (no conflict between statute and ordinance found in this case); *Marro v. General Treasurer of City of Cranston*, 108 R.I. 192, 273 A.2d 660 (1971) (finding statute controlling in this case); *Southern Ry Co. v. City of Knoxville*, 223 Tenn. 90, 442 S.W. 2d 619 *cert. den.* 396 U.S. 1002 (1968); *Lower Colorado River Authority v. City of San Marcos*, 523 S.W.2d 641 (1975); *Wadsworth v. Santaquin City*, 83 Ut. 321, 28 P.2d 161 (1933) (case dealing with "general law" city); *City of Everett v. Fire Fighters, Local #350*, 87 Wn.2d 572, 555 P.2d 418 (1976); Wyo. Const. art. XIII, § 1). If the sta

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"The United States Constitution provides for a national government with a federal system of *states.* Colorado's Enabling Act, approved by the federal government when we acquired statehood, insured that our state will have a republican form of government. Enabling Act, § 4. Clearly our federal system does not envisage as a part thereof city-states. It therefore follows that home rule cities can be only an arm or branch of the state with delegated power. That is the kind of power granted by Article XX." (329 P.2d at 444, 445).

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legislation is uniformly applicable to all cities in a particular class, it will prevail over conflicting city charter provisions and ordinances. These cities would also qualify for immunity under the panel's decision since in the absence of any declared state policy, the home rule city's policy will apply. This independence of local policy was manifested in *Claffin v. Walsh, supra,* where the Kansas Supreme Court declared:

> "No longer are cities dependent upon the state legislature for their authority to determine their local affairs and government. Since home rule cities have power granted directly from the people through the constitution without statutory authorization" (citations omitted) (509 P.2d at 1135).

Also qualifying under the Tenth Circuit's reasoning would be home rule cities in Alaska, Arkansas, Delaware, Illinois, Indiana, Maine, Michigan, Missouri, Montana, New York, South Dakota, Wisconsin, and Puerto Rico. In each of these states (and in Puerto Rico) home rule cities may legislate on any topic relating to municipal affairs in the absence of state legislation on the same topic. *Jefferson v. State,* 527 P.2d 37 (Alas. 1974) (ordinance expressly prohibited by statute in this case); *Rubey v. City of Fairbanks,* 456 P.2d 570 (Alas. 1969); *Beharse v. City of Blytheville,* 254 Ark. 382, 493 S.W.2d 708 (1973); *Gage v. City of Wilmington,* 293 A.2d 555 (Del.Supr. 1972); *City of Urbana v. Houser,* 67 Ill.2d 268, 367 N.E.2d 692 (1977); *City of Bloomington v. Chuckney,* 65 Ind.App. 177, 331 N.E.2d 780 (1975) (but finding here that power specifically denied by statute); *Lewiston Firefighters Ass'n Local 785 v. City of Lewiston,* 354 A.2d 154 (Me. 1976) (although finding preemption here); *Miller v. Fabius Township Bd., St. Joseph County,* 366 Mich. 250, 114 N.W.2d 205 (1962); *St. Louis County v Campbell,* 498 S.W.2d 833 (Mo.App. 1973); *U.S. Mfg. & Distrib. Corp. v. City of Great Falls,* 169 Mt. 298, 546 P.2d 522 (1976); *People v. Cook,* 34 N.Y. 2d 100, 356 N.Y.S.2d 259, 312 N.E.2d 452 (1974); S.D. Const. art. IX, § 2; *Glendale Professional Policemen's Assoc. v. City of Glendale,* 83 Wis.2d 90, 264 N.W.2d 594 (1978); *Cabassa v. Rivera,* 68 P.R.R. 654 (1948). As stated by the Illinois Supreme Court, "[h]ome rule units thus have the same powers as the sovereign except where such powers are limited by the General Assembly." *City of Urbana v. House, supra,* at 694. Presumably the Panel majority would interpret this authority as sufficient to give the city the status of a state in expressing local policy.

The remaining fifteen states may not give cities of any class sufficient local autonomy to qualify for home rule antitrust immunity under the Tenth

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McQuillin is in accord. Relying in part on Colorado authority, his treatise explains:

> "As the people of the state may amend the constitution a state within a state is not created. In other words, a municipality adopting a home rule charter does not become an independent sovereign." 2 E. McQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS, § 9.08a at 638 (1979).

The proper view of home rule cities is also found in the early opinion in *City and County of Denver v. Tihen*, 77 Colo. 212, 235 P. 777 (1925), which explained that *only the state legislature may set forth state policy* on a given subject:

> "The Legislature of the state has sole power to say what the public policy of the state shall be. That public policy must be applicable to all portions of the state, and where, as with us, there are home rule or charter cities and towns (as well as those created by general statute), though the former were created after the Exemption Act which was passed, this policy, as no change has been made in the Exemption Act, still applies to all classes of municipalities . . . .
>
> "Our General Assembly, by statute, in the exercise of its unquestioned power, is the *only* body competent to say what the public policy of the state shall be, and in it resides the sovereign police power of the statute, independent of constitutional, or common law provisions. That public policy of the state applies to every portion of the state. It is

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Circuit's reasoning, since the courts in those states hold that a city's power are limited to those expressly or impliedly conferred by the state legislature. *Colvin v. Ward*, 189 Ala. 198, 66 So. 98 (1914); *State v. City of Roca*, 172 So.2d 230 (Fla. 1965); *Wilson v. City of Council Bluffs*, 253 Iowa 162, 110 N.W.2d 569 (1961); *Reconstruction Finance Corp. v. City of Richmond*, 249 Ky. 787, 61 S.W.2d 631 (1933); *Bradford v. City of Shreveport*, 263 La. 364, 305 So.2d 487 (1974); *Steitenroth v. Jackson*, 99 Miss. 354, 54 So. 955 (1911); *Ronnow v. City of Las Vegas*, 57 Nev. 332, 65 P.2d 133 (1937); *City of Dover v. Wentworth-Douglas Hosp. Trustees*, 114 N.H. 123, 316 A.2d 183 (1974); *In re Incorporation of Indian Hills*, 280 N.C. 659, 186 S.E.2d 909 (1972); *Litten v. City of Fargo*, ____N.D.____, 294 N.W.2d 628 (1980); *United Tavern Owners of Philadelphia v. School District of Phildelphia*, 441 Pa. 274, 272 A.2d 868 (1971); *Dunbar v. Spartanburg*, 266 S.C. 113, 221 S.E.2d 848 (1976); *Tabler v. Bd. of Supervisors of Fairfax County*, ____Va. ____, 269 S.E.2d 358 (1980); Vt. Stat. Ann. tit. 24 §1971; *Toler v. City of Huntington*, 153 W.Va. 313, 168 S.E.2d 551 (1969).

> just as applicable to the home rule cities now as it was and is to municipalities organized under general statutes." 77 Colo. 212, 235 P. 780, 781.

This authority reveals certain errors in the argument advanced by respondent and the Tenth Circuit. Contrary to their view, the Supreme Court of Colorado has unequivocally held that: (1) home rule cities possess delegated powers and are not independent sovereigns; and, (2) only the Colorado General Assembly may promulgate state policy. Hence, it cannot be said that a home rule city's ordinance on even a matter of purely local concern articulates the state policy of Colorado, and is thus exempt from the antitrust laws under *Midcal.*

The Tenth Circuit's erroneous belief that Colorado law treated home rule cites as separate, independent sovereigns when acting on matters of local concern was compounded by the Court's conclusion that home rule cities had "exclusive" authority over such matters. Since exclusive authority would preclude state legislation on local matters, home rule cities were seen as the only entities which could make local policy. Applied to the antitrust context, this analysis of home rule power led to the conclusion that only home rule cites can articulate the anticompetitive policy required for state-action immunity.

The concern caused by the allegedly exclusive authority of home rule entities is unfounded, because no such exclusive authority exists. Although in *City of Canon City v. Merris,* 137 Colo. 169, 323 P.2d 614, 620 (1958), the Colorado Supreme Court did state that "[a]pplication of state law or municipal ordinance, whichever pertains, is mutually exclusive[,]" it rejected the mutual exclusivity rule in two subsequent cases. First, in *Woolverton v. City and County of Denver,* 146 Colo. 247, 361 P.2d 982 (1961), the court rejected the notion that all matters of legislation could be divided into solely statewide or purely local categories, holding instead that matters of mixed state and local concern existed which may be the subject of coexisting state and local law. While the *Woolverton* court retained the mutual exclusion rule in matters of purely local or strictly statewide interest, this vestige of the mutual exclusion rule was extinguished in *Vela v. People,* 174 Colo. 465, 484 P.2d 1204 (1971). The *Vela* court first held that, under Colorado's

home rule provision, the state may, in fact, legislate on purely local matters if the home rule city does not adopt a conflicting local ordinance (484 P.2d at 1205), and then overruled language in *Merris* and *Woolverton* " which suggests that in strictly local and municipal matters ordinances of home rule cities apply to the exclusion of state statutes." (484 P.2d at 1206). Instead, the court explained that the state statutes are only superseded in the event of a conflict.

This short review of Colorado law illustrates certain errors of state law in the Tenth Circuit's opinion and respondent's argument supporting it. Not only does Colorado law restrict announcements of state policy to the General Assembly, but it is now clear that even as to purely local matters, all a home rule city has to do to avail itself of the benefits of state policy is decline to supersede that policy. This could not be true if home rule cities were independent sovereignties as to matters of local concern.

This review also demonstrates that the Tenth Circuit could not rely on *Manor Vail Condominium Ass'n v. Town of Vail,* 604 P.2d 1168 (1980), to support the proposition that cable television was a matter of purely local concern. Since the demise of the mutual exclusion rule, a limited holding that a particular home rule city's ordinance is valid would not, in the absence of any issue regarding the classification of the subject matter, indicate that the subject matter was, in fact, purely local. The subject matter of cable television could well be of mixed state and local concern. Indeed, in light of this Court's holding in *United States v. Southwestern Cable Co.,* 392 U.S. 157 (1968), that cable television is a medium in interstate commerce (a decision rendered before the advent of satellite technology), municipal control of cable television which is unrelated to the protection of municipal rights of way could hardly be considered a matter of purely local concern.[15]

In fact, in the late 1960s the "local concern" issue was extensively litigated in connection with cable television, and the decisions which followed are totally inconsistent with the Tenth Circuit's "purely local concern" conclusion. See, e.g., *General Telephone Co. of the Southwest v. United States,* 449 F.2d 846,

[15] In *TV Pix, Inc. v. Taylor,* 304 F. Supp. 459 (D. Nev.) 1968, *aff'd per curiam,* 396 U.S. 556 (1970), the Court, while noting various local incidents of cable television in the pre-satellite era, was, in fact, upholding *state* regulation of cable television.

853-59 (5th Cir. 1971). In these early cases, telephone companies argued that they could construct cable television facilities for local lease-back without a certificate of convenience and necessity, since cable television was an intrastate activity over which the F.C.C. had no jurisdiction. These arguments were rejected, and F.C.C. jurisdiction has been recognized. *Id.* Accordingly, since cable television is not even of solely intrastate concern, it is obviously not of "purely local concern." *California Interstate Telephone Co. v. F.C.C.*, 328 F.2d 556 (D.C. Cir. 1964) (point-to-point distribution by satellite within state is nonetheless foreign commerce). Colorado law is in accord. *Re The Mountain States Telephone & Telegraph Co.*, 73 P.U.R. 3d 161 (Colo. Pub. Util. Comm. 1968) (P.A. at A-77).

Even assuming, *arguendo*, that cable television in Colorado is purely a matter of local concern, the Colorado authorities cited above reveal that a home rule city's policy on cable television is at most municipal, not *state* policy. They also disclose that, even under such circumstances, a home rule city would not be precluded from taking advantage of state policy to displace competition in the cable television market. They are thus not disadvantaged in any way, and, like everyone else, must await direction from the state in the area of anticompetitive policy.

2. Colorado Courts Have Not Validated the Type of Action Under Review.

Another apparent reason for the Tenth Circuit's decision is its belief that the trial court had invalidated the very type of municipal control validated in the *Manor Vail* case, thus raising a conflict between the antitrust laws and municipal action valid under state law. Again, the Tenth Circuit's analysis missed the mark. First, all local regulation of cable television was not invalidated by the District Court. The trial judge limited his concern to anticompetitive conduct, and no policy of the law is offended by subordinating municipal anticompetitive policy to the Sherman Act. Second, *Manor Vail*, which only involved a subscriber's equal protection challenge to a rate classification differentiating between hotels and condominiums, cannot be read to support Boulder's action.

Finally, two opinions by Colorado state district court judges indicate that respondent has exceeded the bounds of municipal conduct permitted home rule cities. On February 4,

1980, the City sought a temporary restraining order in state district court (*The City of Boulder, Colorado v. Community Commnications Co., Inc.*, (Boulder Dist. Ct. Action No. 80-CV-0198-1)). Although the court pointed to the existence of a pending federal complaint in denying injunctive relief, the court noted that the City had failed to present "satisfactory evidence or legal argument" demonstrating that it would ultimately prevail and, second, that based on CCC's investment and the presence of "significant First Amendment issues",... the equities are balanced in favor of CCC." (Ex. 20, 5, 6; Tr. March 4, 170:21)

Of similar import is a recent decision by the Weld County District Court in *City of Greeley v. Greeley Video, Inc.* (No. 80-CV-270, January 30, 1981). See Appendix to this Brief ("B.A." herein). A home rule city, Greeley, adopted an ordinance in 1968 requiring any person who sought to operate a cable system in the city to first secure a non-exclusive, revocable permit. Although Greeley Video received a permit in January, 1968, delays in FCC approval and economic factors precluded the company from obtaining distant signals, and delays in construction continued even past the advent of satellite technology. As a result, no construction had been undertaken by July, 1979. In that month, the City Council decided to review Greeley Video's license and enacted a moratorium on construction which took effect in August, 1979, and lasted for seven months. During the moratorium, the City engaged in a solicitation process in which companies competed for the market. In that competition Greeley Video placed second to Storer, which was selected by the City Council as *the* cable TV operator for Greeley. Notwithstanding its second place finish, Greeley Video asserted its right to construct a system pursuant to its non-exclusive permit. In response, the City Council found that the company had violated conditions of the permit, and revoked the company's permit. The company thus brought suit.

Notwithstanding the revocable nature of the permit, the state court noted that the City Council was not permitted to revoke arbitrarily. Applying that standard to the City's action, the court held that the City's desire to replace Greeley Video with another cable TV operator was not a valid reason for revoking Greeley Video's permit, particularly in light of the requirement that permits be non-exclusive in character:

"These facts, and [the] record as a whole, lead this court inescapably to the conclusion that the real reason for the revocation of the Greeley Video permit was not the commission of the defaults and violations considered at the hearing, but rather the desire of the Council to carry out its resolution selecting 'Storer Cable TV as the cable TV operator for Greeley.'

"The court in no way impugns the motive of the members of the City Council. . . .

"But Chapter 7A of the Greeley Code of Ordinances does not establish an exclusive license system. The permits under that chapter are specifically stated to be non-exclusive and the city has reserved the right to grant similar permits to others. Thus, the revocation of the permit of Greeley Video is not necessary to enable Storer Cable TV to be *a* cable TV operator in Greeley, as envisioned by Chapter 7A of the ordinances. It would, of course, be necessary to enable Storer Cable TV to be *the* cable TV operator for Greeley.

* * *

"The City Council may believe that under present circumstances a competitive system is not feasible for cable TV in the City of Greeley. If so, its recourse is to alter the ordinance. [Citation omitted.] It may be noted, however, that non-exclusive arrangements in local cable TV franchising are recommended by some authorities as a method of assuring continued technical improvements. [Citation omitted.] (B.A. at BA-10 to BA-11)(emphasis in original).

Judge Matsch's opinion below did not therefore directly conflict or interefere with the ability of Colorado cities to regulate cable television, notwithstanding the assertions to the contrary by the Tenth Circuit. Like its counterpart in Greeley, the Boulder City Council possessed the authority to grant additional permits whenever it desired. While the Federal District Court focused its concern on the federal antitrust laws, and was only objecting to anticompetitive conduct by the City, the opinions by the state district court in Greeley and Judge Neighbors in Boulder indicate that where non-exclusive permit provisions exist, as in Boulder, no tension exists between federal antitrust laws and Colorado common law.

D. Even if a Home Rule Provision is Viewed as a State Policy, There is no State Mandate for Anticompetitive Conduct Associated with Said Policy.

Although the Tenth Circuit apparently misapplied state law to conclude that home rule entities are independent sovereigns entitled to their own state action immunity, it realized that a true state policy would have to be identified if its recognition of city-action immunity was incorrect. In looking for such a state policy, the Tenth Circuit again adverted to respondent's home rule status to conclude that a general grant of home rule authority satisfied "the statement of [state] policy requirement in *Lafayette.*" (P.A. at A-8). This conclusion is incorrect. General grants of authority clearly do not meet *City of Lafayette* standards. This point can be confirmed quickly by asking if the "grant of authority" in question will allow the grantee to "express its own preference, rather than that of the State." 435 U.S. at 414. If so, then *City of Lafayette*'s federalism-based standards are not met. General grants of authority—and few are as general as the home rule provision at issue—obviously allow the grantee to do as it wishes in terms of policy. Indeed, the respondent has repeatedly emphasized that it can even override state policy if it wishes. (Opp. Br. at 23-24). Such unbridled city authority to "express its own" policy preference can never meet *City of Lafayette* standards.

In response to the unavoidable rule that general grants of undifferentiated authority do not satisfy *City of Lafayette* standards, the respondent City has often sought refuge in the following passage from *City of Lafayette:*

> "This does not mean, however, that a political subdivision necessarily must be able to point to a specific, detailed legislative authorization before it properly may assert a *Parker* defense to an antitrust suit . . . . [W]e agree with the [Fifth Circuit] Court of Appeals that an adequate state mandate for anticompetitive activities of cities . . . exists when it is found 'from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of.' " (Opp. Br. at 17).

However, as already demonstrated, the different words used in *City of Lafayette* (e.g., "directed," "required," "authorized," "contemplated," "imposed," etc.) do not signal separate "tests"

for immunity. Moreover, the "contemplation" language which was borrowed from the Fifth Circuit cannot mean that general state grants of authority create immunity under the reasoning of *Parker*.[16]

The decisions by this and other courts uniformly confirm that true state direction with regard to competition in a particular market, rather than general grants of authority, is required before concern for federalism comes into play. For instance, in *Goldfarb, supra,* a "state agency" was granted general authority by the State to regulate the legal profession. And, "though acting within its broad powers," the State Bar was denied *Parker* immunity because it was "not executing the mandate of the State." *City of Lafayette, supra,* 435 U.S. at 410. Therefore, broad grants of unspecified authority by the state do not satisfy the requirement that immunity be based on a clear state policy to displace competition in a particular area.[17]

Even *City of Lafayette* illustrates the error of the respondent's "general authority" argument. If this Court accepted the argument that respondent is immune because general authority contemplates all forms of anticompetitive conduct, then *City of*

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[16] The Fifth Circuit itself has confirmed this in *United States v. Texas State Board of Public Accountancy,* 592 F.2d 919, 920 (5th Cir. 1979), *cert. denied,* 444 U.S. 832 (1980).

[17] There are numerous lower court decisions confirming this point. See, e.g., *Corey v. Look,* 641 F.2d 32 (1st. Cir. 1981) (general authority to operate parking facilities does not authorize anticompetitive operations); *United States v. Texas State Board of Public Accountancy,* 592 F.2d 919, 920 (5th Cir. (1979), *cert. denied,* 444 U.S. 832 (1980) ("the connection between this granted power and the Board's use of it is too tenuous to permit the conclusion that the legislature intended its scope of activity to encompass an anti-competitive regulation"); *Feminist Women's Health Center, Inc. v. Mohammad,* 586 F.2d 530, 550 (5th Cir. 1978), *cert. denied,* 444 U.S. 924 (1980) (Director of Florida Board of Medical Examiners was not acting within the intended scope of his statutory authority by pressuring doctors to cease practice, absent unethical or illegal conduct by doctors); *Duke & Co. v. Foerster,* 521 F.2d 1277, 1281 (3d Cir. 1975) (statutory authority to establish and operate airport, auditorium, and stadium did not express policy to boycott certain suppliers); *Grendel's Den, Inc. v. Goodwin,* 495 F.Supp. 761, 769 (D. Mass. 1980), aff'd, 1981-1 Trade Cas. ¶ 63978 (1st Cir. 1981) (statute granting church and school officials veto power over liquor license applications did not express anticompetitive policy); *Guthrie Aircraft, Inc. v. Genessee County,* 494 F.Supp. 950, 956 (W.D.N.Y. 1980) (statutory authority to establish and operate airport did not express policy to revoke license of fixed base operator and grant monopoly license to competitor); *Mason City Center Associates v. City of Mason City, Iowa,* 468 F.Supp. 737, 742 (N.D. Iowa 1979) (general authority to zone did not express anticompetitive policy).

Lafayette itself would have to be reversed. As one District Court has pointed out, "the city [of Lafayette] has general authority to operate a public utility. What it lacked was the specific authority to engage in . . . anticompetitive operations." *In Re Airport Car Rental Antitrust Litigation,* 474 F.Supp. 1072, 1096 (N.D. Cal. 1979) (involving, *inter alia,* the Colorado home rule City of Denver).

The very language from *City of Lafayette* quoted by respondent also confirms that this Court has not endorsed immunity for isolated local policies developed under general grants of authority. As the passage makes clear, a "*state mandate*" is what is required, and such a mandate is not present if it is not apparent "from the authority given to operate in a particular area, that the legislature contemplated the kind of action complained of." These words relate to an actual *state* decision to authorize a specific *kind* of action in a *particular* area. Such a standard would exclude cities expressing their own preference, but allow for federal deference to true anticompetitive policies adopted as an act of government by the state as sovereign. Since the respondent city has simply inverted the plain meaning of the Court's language, its effort to immunize all anticompetitive actions taken pursuant to broad grants of general home rule authority should be rejected.[18] By definition, home rule cities declare only municipal, not state, policy.[19]

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[18] Assuming, *arguendo,* that some general state policy is identified, it is nonetheless clear that the state has not directed or authorized any particular type of anticompetitive actions under such policy. Even under the relaxed "state contemplation" test advanced by the respondent, (Opp. Br. at 16-19), antitrust immunity does not exist under the facts of this case. The Colorado Legislature has never explicitly contemplated restraints on cable television competition. Cable television is not among the eight enumerated powers in the Home Rule Amendment. Colo. Const. art. XX, Section 6, nor is there any explicit reference in the Home Rule Amendment to any anti-competitive municipal conduct related to cable television. Outside of the enumerated powers, the Home Rule Amendment is such a broad mandate that it contemplates nothing with particularity. The City engages in *reductio ad absurdum* if it argues that by contemplating nothing specifically, the Home Rule Amendment contemplated all. Lower courts have been unwilling to infer from such a broad mandate an intent to immunize particular acts from antitrust scrutiny. *See, e.g., Hahn v. Oregon Physician's Serv.,* 508 F.Supp. 970, 976 (D.Ore. 1981) ("To be entitled to state action immunity, the state's anticompetitive policy must be affirmative, not passive or inferential").

[19] Moreover, it is self-evident that the prerequisite governmental mandate must be expressive of a *valid* state policy. Since a state policy and mandate which violates First Amendment guarantees is obviously invalid,

(footnote continued on following page)

E. The Proprietary-Nonproprietary Distinction Has No Logical Relevance to State Action Immunity Issues Under *Parker*.

In addition to the two-fold manner in which Boulder's home rule status influenced the Tenth Circuit's decision, the Tenth Circuit alternatively relied on the proprietary-nonproprietary distinction to reach its decision.[20] The Tenth Circuit held that *City of Lafayette* only applied to cases where a city is in the business at issue, and then concluded that all other forms of municipal conduct are "governmental" actions entitled to blanket antitrust immunity. In fact, Boulder's actions in this case are clearly proprietary under state law.[21] However, analysis of the federalism rationale behind *Parker* reveals that the Tenth Circuit's decision to exempt all "governmental" acts by cities is unsupportable regardless of how municipal conduct is characterized.

(footnote continued from preceding page)
such a policy could never form a lawful basis for an antitrust exemption. All parties to this action concede that CCC is engaged in First Amendment activity. (*See, e.g.*, Kerner depo. at 186-88; Westdyke depo. at 69). Given the violations of CCC's First Amendment rights (P.A. at A-14 to A-22), this case presents no valid governmental policy on which to base antitrust immunity. Not even Congress could impose an anticompetitive scheme which violates the First Amendment.

[20] To the extent that the Tenth Circuit's blanket immunization of "nonproprietary" (or "governmental") municipal activity is based on the concurrence by the Chief Justice in *City of Lafayette*, it is submitted that the Court of Appeals read too much into said concurrence. *See* Petition for Writ of Certiorari, at 15-18. Saying that cities engaged in actual "business activity" cannot restrain trade in the relevant market in the absence of clear state direction obviously does not suggest that blanket immunity exists in all other situations. *See* 435 U.S. at 425.

[21] Under Colorado law, it is well-settled that the enactment and enforcement of municipal ordinances like those at issue are exercises of proprietary conduct for two reasons: (1) the ordinances involve access to the city's rights of way; and (2) the ordinances involve the procurement of a service for the citizenry. The Boulder ordinances, by their terms, revoked a prior ordinance granting petitioner the right to use city streets and rights-of-way for stringing cable, and then granted petitioner the same rights subject to geographical restriction.

> "The granting of the right by the city to a public service corporation to use the streets of the municipality, or the granting by the General Assembly to such a corporation of the right to use the highways of the state, is the exertion of the proprietary power of the sovereign."

City & County of Denver v. Mountain States Telephone & Telegraph Co., 67 Colo. 225, 230, 184 P. 604, 607 (1919), *overruled on other grounds, People v. Mountain States Telephone & Telegraph Co.*, 125 Colo. 167, 243 P.2d 397 (1952); see also J. BANKS, COLORADO LAW OF CITIES & COUNTIES Section 2.8, at 35 (3d ed. 1979); 2 E. MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS, Section 4.154, at 231 (3d ed. 1979); *Perl-Mack Enterprises Co. v. City & County of Denver*, 194 Colo. 4, 9, 568 P.2d 468, 472 (1977).

This Court's decisions applying *Parker* hold that certain types of affirmative policy decisions by the 50 states are entitled to deference in our federal system. Assuming that the other *Parker* standards are met,[22] the source of a given policy determines whether it is exempt from the antitrust laws. If the state itself is not the source, there cannot be state action immunity under the logic of *Parker*, regardless of whether the challenged activity is "governmental" or "proprietary."

This reveals the obvious: the proprietary-nonproprietary distinction cannot in any way aid an inquiry into whether a state policy exists, or aid an inquiry into whether that policy rises to the stature necessary to warrant federal deference. The distinction thus has no conceptual relevance to the federalism inquiry which controls state action immunity issues. This is evidently why *City of Lafayette*—while admittedly involving municipal conduct traditionally viewed as proprietary—nonetheless refers to *Parker*'s roots in federalism, and announces broad principles applicable in either the "proprietary" or "governmental" contexts. For the purposes of federalism, in other words, it makes no difference whether city policy is "governmental" or "proprietary," since the determinative factor is whether the policy to be immunized is a *state* policy. "Cities are not themselves sovereign; they do not receive all the federal deference of the State that creates them." *City of Lafayette*, 435 U.S. at 412.

By exempting municipal conduct because it is "governmental" rather than because it reflects state policy entitled to federal deference, the Tenth Circuit has, in reality, created a third, new implied immunity from the antitrust laws. Under This new governmental-acts-in-the-absence-of-state-policy immunity, local governments will be fully immunized simply by virtue of their status as local governments, unless they are "in the business" at issue. (P.A. at A-6). This amounts to automatic immunity for local governments in virtually all their dealings. Such wholesale exclusions of parochial anticompetitive policies from antitrust coverage is exactly what *City of Lafayette* disapproved. 435 U.S. at 408.

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[22] Even when a state is the source of an anticompetitive policy, there is no antitrust exemption if the policy is not an affirmatively expressed and clearly articulated act of government by the state as sovereign. *See, e.g., California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980).

The Tenth Circuit's new local governmental acts immunity is not supported by the reasoning of any of this Court's antitrust immunity cases.[23] It is also extremely ill-advised as a matter of policy, as explained in the following sections. This Court should thus decline what amounts to an invitation to carve out a vast new implied immunity for the "governmental" acts of entities other than the state itself.

III.

POLICY CONSIDERATIONS MILITATE AGAINST BROAD MUNICIPAL ANTITRUST IMMUNITY

Through *Parker* and its progeny, this Court has developed a federalism basis for exempting some forms of clear state policy from the antitrust laws. As thus articulated, this federalism policy lends no logical support to the Tenth Circuit's recognition of implied municipal antitrust immunity for "governmental" acts and home rule policies. It is thus submitted that other policy considerations motivated the Court of Appeals to create what are, in reality, two new implied exemptions from the antitrust laws. For instance, the Tenth Circuit seemed to believe that (1) governmental actions in general are innocuous because they are for the public good; and (2) state ability to delegate authority will be impaired if local governments are not exempt from antitrust compliance. Such policy considerations are not new: they were both raised and specifically rejected in *City of Lafayette*. As explained below, they should also be rejected in this case because they lack merit in their own right and, in any event, are inadequate to justify municipal antitrust immunity because they do not outweigh important counterveiling policies.

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[23] The Tenth Circuit's use of the proprietary-nonproprietary distinction in the State action context should also be rejected because the distinction is widely acknowledged to be incapable of uniform application. As the dissent in *City of Lafayette* observed: "The distinction between "proprietary" and "governmental" activities has aptly been described as a "quagmire." The "distinctions [are] so finespun and capricious as to be almost incapable of being held in the mind for adequate formulation." 435 U.S. at 433 (citiations omitted); *See* also 2 E. McQUILLIN, LAW OF MUNICIPAL CORPORATIONS, §10.05, at 743 (3d ed. 1979).

A. The Fact That Actions By A City May Be In The Public Interest As The City Sees It Does Not Justify Violation Of The Antitrust Laws

Implicit in the notion of municipal antitrust immunity is the argument that local governments should be allowed to restrain trade because they are not motivated by private business considerations, but only by a desire to serve the public interest. This "public service" argument is without merit in both the proprietary and governmental realms. It was flatly rejected by this Court in *City of Lafayette,* a so-called proprietary fact situation. 435 U.S. at 405-06. The very same reasons apply in connection with the Tenth Circuit's broad immunity for home rule entities, since the proposed home rule exemption is not confined in any way to the governmental actions of a home rule city.

The public service argument also fails to justify any form of municipal "governmental acts" immunity. First, the cases show that cities not "in the business" are still capable of anticompetitive action which serves narrow private interests rather than broader social goals.[24] Second, even when there is a public service motivation, the mandates of *National Society of Professional Engineers v. United States,* 435 U.S. 679 (1978), operate to deny local governmental immunity.

In essence, the public service argument is a separate policy argument grounded on the belief that government can be trusted, rather than on the overriding interest of federalism as defined by the decisions of this Court applying *Parker.* The advocates of the public service argument contend that local governments can often identify anticompetitive policies which

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[24] In addition to the instant case, *see, e.g., Corey v. Look,* 641 F.2d 32 (1st Cir. 1981) (a town allegedly gave favored treatment to plaintiff's competitor and drove plaintiff out of parking lot business); *Kurek v. Pleasure Driveway & Park District of Peoria, Illinois,* 557 F.2d 580 (7th Cir. 1977), vacated & remanded, 435 U.S. 992, *aff'd per curiam* on remand, 583 F.2d 378 (7th Cir.), *cert. denied,* 439 U.S. 1090 (1978) (park district allegedly conspired with one concessionaire to coerce other concessionaires to raise and fix prices, and to exclude those concessionaires refusing to be so coerced); *In re Airport Car Rental Antitrust Litigation,* 474 F.Supp. 1072 (N.D. Cal. 1979) (various cities prohibit competitor car rental firms from competing for airport patrons); *Woolen v. Surtran Taxicabs, Inc.,* 461 F.Supp. 1025 (W.D. Tex. 1978) (two cities give one taxi company exclusive right to serve airport); *Guthrie Aircraft, Inc. v. Genesee County,* 494 F.Supp. 950 (W.D.N.Y. 1980) (county allegedly conspired with plaintiff's competitor to prevent plaintiff from competing for county airport business).

will be better for society than Congress' pro-competition policy. It is thus argued that local governments should be allowed to substitute their judgment for that of Congress in such situations.

This argument is conceptually identical to the argument that was made and rejected in *National Society of Professional Engineers.* As this Court observed in *National Society,* Congress has made a controlling policy determination favoring competition, and that policy cannot be overruled by those who feel that competition in a given situation is not in the best public interest. 435 U.S. at 692-94. Efforts to justify deviations from our national pro-competition policy on the ground that other socially desirable consequences will ensue "is nothing less than a frontal assault on the basic policy of the Sherman Act." *Id.* at 695. No matter how well-intentioned, such assaults have never been countenanced, given the preeminent importance of the antitrust policy.

By definition, a local government only needs antitrust immunity for governmental acts when it wants to advance some social goal other than competition. By definition, therefore, the public service argument will always run afoul of *National Society of Professional Engineers.* The legality of a restraint is determined by focusing "directly on the challenged restraint's impact on competitive conditions," and not on other policy justifications. 435 U.S. at 688. This reveals that the public service argument is not really an immunity argument at all; it is an effort to persuade the courts of the reasonableness of the anticompetitive economic or social policies local governments adopt. "That kind of argument is properly addressed to Congress," but not to the courts.[25] *Id.* at 689.

The fact that this Court has recognized an implied exemption for the public service policies of states does not lead to a different conclusion. Clear state anticompetitive policies are not exempt because they are considered preferable to congressional antitrust policy; they are exempt from the antitrust laws under a narrow federalism rationale. *See City of Lafayette,* 435 U.S. at 407 n.33. Since parochial municipal policies are not entitled to such federal deference under the reasoning of this Court's state action decisions, immunity does not exist at all.

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[25] This reveals that the concept of blanket municipal immunity also suffers from overbreadth. Any effort to have Congress create a new antitrust exemption would require articulation of the particular area in which displacement of competition is desired, and not simply a request for broad immunity for any type of anticompetitive arrangement local governments might devise.

B. Local Governmental Autonomy Is In No Way Impaired By Having To Obey The Antitrust Laws

Supporters of municipal antitrust immunity have also argued that denial of immunity will impair local governmental autonomy and hamper the states' ability to efficiently delegate authority to their political subdivisions. See 435 U.S. at 434-35 (Stewart, J., dissenting). Although it is questionable that such ulterior policy considerations could circumvent the rule of *National Society of Professional Engineers*, it is apparent in any event that the concern about hampering state and local governmental operations is unfounded.

Under this Court's state action exemption cases, local governments are as free as they ever were to receive delegated authority and even autonomy from the state. It is true that they must obey the antitrust laws while they exercise their municipal powers, but this does not mean that they have less political autonomy.

The dissenting opinion in *City of Lafayette*, of course, summarized a different viewpoint. The dissent states that *City of Lafayette*, "by demanding extensive legislative control over municipal action, will necessarily diminish the extent to which a State can share its power with autonomous local governmental bodies." 435 U.S. at 435. It is submitted that the dissent's concern is misplaced, because *City of Lafayette* did not "demand" any form of legislative control over municipal action, or create a situation where such control cannot be avoided. *City of Lafayette* requires municipal obedience to the antitrust laws in the absence of sufficient state direction, and that is all. This hardly means that *City of Lafayette* will affect the normal relationships between state and local governments.

For example, in all areas not involving anticompetitive policies, *City of Lafayette* will have no impact whatsoever. Moreover, local governments have no autonomy to restrain trade, any more than they have autonomy to violate the Civil Rights Act or other laws.[26] Therefore, the state's power to use local government as it sees fit—within the limits of the law—is unaffected by *City of Lafayette*. If anything, this Court has allowed a more flexible use of local governments in the antitrust area, since a state can even use its municipalities to implement

[26] *See, e.g., Owen v. City of Independence*, 445 U.S. 662, 639 (1980).

anticompetitive policies if it satisfies *City of Lafayette* standards. Given the significance of the antitrust policies, and the limited nature of the implied state action immunity, this Court's accommodation of state anticompetitive preferences would appear to be quite generous.

Proponents of the impairment-of-autonomy argument apparently believe that requiring municipal conformity to the antitrust laws will force cities to "obtain approval of each law from the legislature." 435 U.S. at 435. One problem with this view is the way it is expressed. By using the word "approval," it assumes that local government should have an active role in originating anticompetitive policy, and that this role will be complicated if state endorsement is required. However, local government has no such role. Competition is the controlling policy goal, and local governments must honor this goal. Only states can originate anticompetitive policy; and they are not allowed to do so because their policies are better, but because only states have the type of sovereign status which triggers federal deference in the *Parker* sense.[27]

The argument that *City of Lafayette* complicates government because it requires "approval of each law" is also overstated. Since the need for such "approval" will only arise when a local government wants to restrain trade, the need should rarely arise if municipalities embrace the goals of the Sherman Act as they should. Under *City of Lafayette,* local government discretion is only restricted to the extent that anticompetitive conduct is contemplated. Even in that context, a city can act if the state has so directed. States are perfectly capable of giving such direction in those areas where *they* decide competition should be displaced.[28] Therefore, *City of Lafayette* will not destroy the efficacy of local government, but it will advance national antitrust policy.

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[27] The belief that local government should be allowed to originate restraining policy is, therefore, just a variation of the public service argument. As discussed above, this Court has properly rejected the public service argument. Once federalism is accommodated by allowing states to implement clear anticompetitive policies which they themselves originate, antitrust policy should not be expected to give way any further.

[28] *See, e.g., New Motor Vehicle Board of California v. Orrin W. Fox. Co.,* 439 U.S. 96, 109 (1978); *Shrader v. Horton,* 471 F.Supp. 1236, 1242 (W.D. Va. 1979), aff'd *per curiam,* 626 F.2d 1163 (4th Cir. 1980).

C. The Tenth Circuit's Analysis Impermissibly Allows Home Rule Governments to Adopt Anticompetitive Local Policy Even in Defiance of Contrary Procompetitive Policy by the State and National Governments

In addition to the inherent flaws of the pro-immunity arguments discussed above, there are several counterveiling policies which support the *City of Lafayette* standard. For instance, the Tenth Circuit noted that home rule local governments in Colorado can "supersede a state statute as to matters of purely local concern." (P.A. at A-5 to A-6). Therefore, while this case involved no state policy "whatever," the Tenth Circuit fashioned a rule which will immunize many home rule anticompetitive policies even where a conflicting state policy exists, since city ordinances supersede if they relate to purely local concerns. There is no reason based in federalism to defer to a city policy which the state itself opposes or declines to endorse, and automatic immunity for home rule entities is thus unjustified.

D. Broad Antitrust Immunity for Local Governments Would Entail Unacceptable Impairments of Our National Free-Market Policy

The respondent intimates that the immunity it seeks would not lead to the type of "highly predatory conduct" involved in *City of Lafayette*. (Opp. Br. at 20). The City's position, which the Tenth Circuit evidently adopted, does not withstand scrutiny. The broad immunity recognized by the Tenth Circuit cannot be confined solely to the facts of this case. Under the Tenth Circuit's ruling, the City of Lafayette itself could presumably have engaged in the "highly predatory conduct" of that case if it had been a home rule city. In reality, therefore, the respondent position would clear the way for predatory municipal conduct by home rule entities, even if the City of Boulder feels it would never engage in such behavior itself.[29]

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[29] In fact, though, Boulder's market allocation scheme is a *per se* violation. *See, e.g., Woolen v. Surtran Taxicabs, Inc.*, 461 F.Supp. 1025 (N.D. Tex. 1978) (exclusive market allocation to one private company by joint venture of two cities). This case involves a blatant scheme to allocate customers and territory among horizontal competitors. Such market allocations are traditionally viewed as *per se* violations of the antitrust laws. *United States v. Topco Associates*, 405 U.S. 596 (1972). The Tenth Circuit's confusion may be due to a suspicion that cable television is really like a monopoly public utility service. Cable television, however, involves competitive markets and is not a public utility. See, e.g., *Television Transmissions, Inc. v. Public Utilities Comm'n*, 47 Cal.2d 82, 310 P.2d 862 (1956) (First Amendment speakers should not be viewed as public utilities); P.A. at A-70 to A-91.

Moreover, predatory conduct and *per se* violations are not confined to situations where a city is in the business at issue,[30] or to home rule entities.[31] It is also clear that violations of the Rule of Reason would be serious deviations from antitrust policy, regardless of the status of the entity involved in the transgression.

These numerous threats to the integrity of congressional antitrust policy are compounded by the fact that local governments are capable of a wide variety of restraining activities. The cases report that local governments are increasingly active in the realm of economic regulation (even when cities do not actually become business competitors), and that they often use their authority to extensively control or even eliminate competition in normally competitive markets.[32] Accordingly, immunizing so-called "governmental" actions would seriously imperil the effectiveness of the antitrust laws, especially considering the large number of actions which would be considered governmental under the Tenth Circuit's reasoning. A broad antitrust exemption for home rule entities would involve even greater gaps in antitrust enforcement.

These local departures from the antitrust laws would also be more alarming than federal deference to state policies for two reasons. First, in terms of sheer numbers they would far exceed state restraints on trade, even though no *Parker* type federalism rationale is available to justify exemptions of independent municipal policies. Second, state anticompetitive policies at least reflect coherent statewide alternatives to the antitrust laws, whereas local schemes would likely reflect a welter of piecemeal, inconsistent efforts to serve parochial

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[30] In addition to the instant case, *see, e.g., Corey v. Look*, 641 F.2d 32 (1st Cir. 1981) (city restraints on parking lot competition); *Duke & Co. v. Foerster*, 521 F.2d 1277 (3rd Cir. 1975) (city and county restrictions on certain brands of beer); *Guthrie Aircraft, Inc. v. Genesee County*, 494 F.Supp. 950 (W.D.N.Y. 1980) (county restrictions on charter air service); *Pinehearst Airlines, Inc. v. Resort Air Services, Inc.*, 476 F.Supp. 543 (M.D.N.C. 1979) (same as Genesee County); *In re Airport Car Rental Antitrust Litigation*, 474 F.Supp. 1072 (N.D. Cal. 1979) (city restrictions on car rental competition at airports); *Mason City Center Associates v. City of Mason City*, 468 F.Supp. 737 (N.D. Iowa 1979) (use of zoning law to prevent shopping center competition); *Woolen v. Surtran Taxicabs, Inc.*, 461 F.Supp. 1025 (N.D. Tex. 1978) (city restriction of taxicab competition at airport).

[31] See *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978).

[32] See the authorities cited at footnote 30, *supra.*

interests at the expense of wider concerns. The harm to antitrust goals would therefore be too great to justify automatic municipal immunity. Since no true *state* anticompetitive goal will be impaired by denying municipal immunity in the absence of a state mandate, it is submitted that federalism will not be offended by upholding the standards of *City of Lafayette.*

E. Basing Antitrust Exemptions on Distinctions In Municipal Status Will Lead to Confusion and Excessive Immunization

Any attempt to use the status of a local government as a basis for allocating implied antitrust immunity will prove unworkable given the myriad of different types of local governments in this country. The various distinctions set forth in respondent's Opposition to the Petition for Certiorari (Opp. Br. at 24-25) just hints at the problem. Although impossible to say with certainty given the shifting factors involved,[33] the chart in the Appendix to this Brief attempts to summarize the powers of cities in the various states, and illustrates that there is no neat distinction between "home rule" cities and other cities. Since only the class of cities with the greatest local autonomy is represented for each state on the chart, it should not be inferred that cities with less local autonomy than those represented would not also qualify for immunity under the Tenth Circuit's reasoning. Moreover, some states have home rule counties which might also qualify for immunity.[34]

The chart distinguishes between three different sources of authority: (1) directly and expressly from the state constitution; (2) from the state legislature or general assembly where the state constitution directs the legislature to provide for municipal powers; and (3) from the state legislature alone, as where the state constitution provides that cities may be incorporated but mentions nothing about the legislature granting them power.

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[33] For instance, powers vary depending on whether a matter is of "local" or "statewide" concern, whether a law is "general" or "special," and so forth. The varying definitions given by state courts to such words are familiar obstacles to clarity in this area. *See, e.g.,* 2 E. McQUILLIN, LAW OF MUNICIPAL CORPORATIONS, § 4.85 (3d ed. 1979).

[34] *See, e.g.,* Cal. Const. art. XI, §§ 1, 4. Haw. Const. art. VII, §§ 1,2. Md. Const. arts. XI-A, XI-E.

The chart then shows that the difference in source of authority does not account for the difference in extent of authority between cities.[35] Given the complex variety of local governments, it is submitted that municipal antitrust immunity, once recognized, could not predictably be confined to any clear category of local governments. The Tenth Circuit's decision will thus result in massive and unacceptable intrusions on antitrust policy, and should be rejected.

CONCLUSION

There is no indication that *City of Lafayette* has caused the difficulties for local governments which the dissent feared. Indeed, the cases suggest that the most visible result is the elimination of many unnecessary and unjustified municipally-imposed monopolies and other restraints on trade. Such salutary consequences should be encouraged, the *City of Lafayette* standard should be upheld, and the decision below by the Tenth Circuit Court of Appeals should therefore be reversed and the case remanded for reinstatement of the preliminary injunction.

Respectfully submitted,

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[35] See also footnote 14.

APPENDIX TO THE BRIEF

IN THE DISTRICT COURT
IN AND FOR THE
COUNTY OF WELD AND STATE OF COLORADO

CITY OF GREELEY, a Municipal corporation, *Plaintiff,* vs. GREELEY VIDEO, INC., a Colorado corporation, *Defendant.*	Civil Action No. 80 CV 270
GREELEY VIDEO, INC., a Colorado corporation, *Plaintiff,* vs. THE CITY COUNCIL OF THE CITY OF GREELEY, THE MEMBERS OF THE CITY COUNCIL OF THE CITY OF GREELEY, in their capacity as councilpersons, and THE CITY OF GREELEY, *Defendants.*	Civil Action No. 80 CV 859

MEMORANDUM OF DECISION

These cases arise out of the effort of the City of Greeley to cancel the license of Greeley Video, Inc., to operate a cable television system in Greeley. Since the factual situation and the legal principles involved are the same in both cases, the basis

for the decision of the Court in both can be stated in this memorandum. Separate judgments will be entered in each case in accordance with the relief requested.

Civil Action No. 80 CV 270 is an action for declaratory relief. In that action the City is plaintiff, and seeks a declaratory judgment establishing (a) that Greeley Video, Inc., the defendant in that action, had voluntarily abandoned and surrendered its permit; (b) that Greeley Video is estopped from denying such abandonment; and (c) that the City is entitled to revoke the permit of Greeley Video.

In Civil Action No. 80 CV 859 the parties are reversed. This is an action under Rule 106, C.R.C.P., seeking a determination that the action of the City Council of the City of Greeley in revoking the permit of Greeley Video was arbitrary, capricious, unlawful, in excess of its jurisdiction, and void.

The City of Greeley is a home rule city. Article XVIII of the Charter of the City of Greeley is entitled "Franchises and Public Utilities." Operators of "closed television circuits" are included within the definition of the term public utility in Section 18-1 of that article. Section 18-3 of that article provided that franchises shall be granted only "upon the majority vote of the qualified taxpaying electors voting thereon at a special election called for such purpose."

Section 18-9 of the same article is as follows:

> The Council shall have the power to grant a permit for the temporary use or occupation of any street, alley or public place. Such permit shall be revocable at the pleasure of the Council whether the right be expressly reserved in the permit or not.

In Article III of the Charter, Section 3-11 provides as follows:

> The Council may provide for licenses and permits and fees therefor, for regulatory or revenue purposes. The Council shall hear and decide appeals relating to issuance, suspension or revocation of licenses or permits.

On January 2, 1968, the City Council of the City of Greeley adopted Ordinance No. 1-1968. This ordinance is now Chapter 7A of the Greeley Code of Ordinances.

That chapter requires that any person seeking to operate a cable distribution system within the City of Greeley shall secure a "non-exclusive permit" before commencing to operate such a system.

Section 7A-5 of that chapter makes the following provision regarding such permits:

> The right of the permittee to use the streets and public ways of the city and conduct its business in the city shall be nonexclusive, and the city reserves the right to grant a similar use or uses in said streets and public ways and authorize additional cable system business in the city.

Section 7A-4 of the chapter provides in part as follows:

> The right, permit and privilege authorized in this chapter are subject to revocation by the city council, at its pleasure and discretion at any time.

On January 16, 1968, a permit under Chapter 7A to operate a cable television system within the City of Greeley was issued to Greeley Video.

In its initial application Greeley Video had agreed to install its system in about a year from the date of its being granted the permit, although the exact time of construction and operation was to be dependent upon the receipt of certain permits from other parties. On December 17, 1968, the City Council approved the modification of the completion term of the permit to require that Greeley Video would begin construction on its system within 60 days after approval of the project by the Federal Communications Commission.

No approval of the application by the Federal Communications Commission was secured until 1975. By order of the F.C.C. adopted March 31, 1975, and released April 7, 1975, the application of Greeley Video was approved and it was ordered that an appropriate certificate of compliance be issued.

Thereafter a period elapsed during which there was correspondence by Greeley Video to the City Manager of Greeley, generally unanswered, in which the prospects of actual construction of the system was discussed; however, no actual construction was undertaken.

The problem chiefly causing the delay was the fact that there was no feasible method of transmitting signals for television programs originating in distant parts of the nation to the Greeley area. The construction of a microwave system from the nearest point of signal availability, Farmington, New Mexico, would have been inordinately expensive.

In 1977 and 1978 there was developed a plan of transmission by satellite which led to the solution of the economic problem. Signals from the satellite could be picked up for local distribution by a relatively inexpensive antenna system.

The largely one-sided correspondence from Greeley Video to Greeley officials continued. This correspondence set forth a series of target dates, which were constantly postponed, by which Greeley Video would bring the proposed system into existence. The last such target date in this series of correspondence was November 1, 1979.

In the meantime, however, the City Council had come to the conclusion that it wished to reconsider its position concerning the cable TV system.

On October 24, 1978, the City Council, acting as a committee of the whole, by consensus decided to recommend that an ordinance be prepared to establish a franchise system for cable TV in Greeley.

On July 21, 1979, the City Council, again acting as a committee of the whole, adopted a recommendation that there be a moratorium on the construction of a system by Greeley Video under its existing permit, and that a procedure be adopted for the review of the license and consideration of applications by other interested firms. This course of action was adopted in a resolution enacted by the council on August 7, 1979, and the moratorium was established as 75 days beginning August 8, 1979. The moratorium was ultimately extended until March 31, 1980.

During the moratorium period a lengthy review was conducted of the cable TV situation, including visits to examine facilities operated by applicant firms. Greeley Video was one of the firms given consideration, and apparently placed second.

This review procedure culminated on February 19, 1980, when, according to the minutes of the Greeley City Council meeting of that date, the following action was taken:

> A motion was made by Princic, seconded by Terry, to select Storer Cable TV as the cable TV operator for Greeley. Motion carried: 5-0.
>
> A motion was made by Murphy, seconded by Terry, to refer to the Committee-of-the-Whole the alternatives between the permit system and franchise system, and the subject matter to be negotiated with Storer Cable TV. Motion carried: 5-0.

There was additional correspondence between the city officials and Greeley Video relative to the permit held by Greeley Video, the intent of the city to revoke the same, and the intent of Greeley Video to proceed with construction regardless of the threatened revocation. Other collateral matters were also discussed.

On April 2, 1980, the complaint in Civil Action No. 80 CV 270 was filed, seeking the declaratory relief mentioned above.

After the filing of that action Greeley Video proceeded with the actual construction of its system, despite the objections of the city. Substantial expenditures have been made in the construction of that system; however, the great bulk of such expenditures were made after Greeley Video became aware of the intent and desire of the City of Greeley to revoke its permit.

On September 9, 1980, and September 16, 1980, hearings were held concerning the revocation of the permit of Greeley Video. The only witness appearing in support of the revocation was the City Manager, Mr. Peter Ray Morrell. A number of witnesses appeared in behalf of Greeley Video, Inc., in opposition to the revocation.

On September 23, 1980, the Greeley City Council passed its Resolution No. 57, 1980, the salient portions of which are as follows:

> WHEREAS, the City Council having considered all the evidence presented finds that Greeley Video has not complied with the terms of its application for the subject permit and has not complied with the provisions of Chapter 7A of the Greeley City Code, and the requirements of said permit in its installation of cable television in the City of Greeley and
>
> WHEREAS, it is in the best interest of the people of the City of Greeley for their common good and welfare that said permit should be revoked or terminated.
>
> NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF GREELEY, COLORADO, that the permit for the installation of cable television which was issued to Greeley Video, Inc. by resolution dated January 16, 1968 is hereby revoked and terminated by the City of Greeley.

The validity of these revocation proceedings is challenged by Greeley Video, Inc., in Civil Action No. 80 CV 859.

This is the general background of this case, and the Court may now consider the specific claims being made by the parties.

DID GREELEY VIDEO ABANDON THE PERMIT?

In the original action it was the contention of the City of Greeley that Greeley Video had abandoned its permit, and therefore no longer possessed it. As the cases have progressed, the City has not precisely abandoned this theory, but the subsequent revocation proceedings carry the implication that the permit was not voluntarily abandoned.

But even in the absence of such revocation proceedings, no real evidence of abandonment was presented. It is true that a long period of time elapsed between the granting of the permit and the commencement of construction on the system. Delays

were, however, largely caused by circumstances beyond the control of Greeley Video, Inc., and accordingly, the delay does not provide the necessary evidence of an intention to abandon. *Cf. Hoff* v. *Girdler Corp.*, 104 Colo. 56, 88 P.2d 100 (1939).

IS GREELEY VIDEO, INC., ESTOPPED TO DENY THAT IT ABANDONED AND RELINQUISHED ITS PERMIT?

One of the claims initially asserted by the City is that Greeley Video, Inc. is estopped to deny that its permit has been abandoned. Here again the evidence does not support the contention.

The claimed estoppel arises primarily from certain remarks made by Mr. Bill Daniels, principal in the parent firm of Greeley Video, Inc., in the course of a meeting held January 9, 1979 in which the Greeley City Council was sitting as a committee of the whole. It is also claimed that the subsequent cooperation of Greeley Video, Inc. in the evaluation of various aspirants for a Greeley permit constituted an estoppel.

Viewed in context, the remarks of Mr. Daniels cannot be taken as a statement that Greeley Video was prepared to abandon its permit.

Nor does the evidence indicate that the City changed its position in response to these statements or the subsequent actions of Greeley Video, Inc. The complaint alleges that a great deal of time was spent by the City; however, the process for review of the outstanding permit had commenced on October 24, 1978, when the City Council, acting as a committee of the whole, decided to recommend the preparation of an ordinance to establish a franchise system. This was before Mr. Daniels had made his statement.

The complaint also alleges that "the City of Greeley and its representatives . . . have invested a substantial amount of money" because of the representations of Greeley Video, Inc. No evidence of the amount of such expenditures was introduced.

Since there was no showing of a change of position by the City in justified reliance on representations of Greeley Video, Inc., the claim of estoppel cannot be sustained. *Susman* v. *Exchange National Bank*, 117 Colo. 12, 183 P.2d 571 (1947).

IS THE PERMIT REVOCABLE WITHOUT CAUSE?

Both parties agree that the permit in question is revocable, but disagree whether some cause is necessary for its revocation.

> Although a lawfully issued license or permit may not strictly be property, it has some of the aspects of property and is entitled to protection against arbitrary revocation. . . .While it is true that a license carries no property right, a license once granted may not normally be revoked at the mere option or whim of the licensor.
>
> 9 McQuillin, *Municipal Corporations*, Section 26.81a (1978).
>
> Courts will reverse municipal decisions to revoke licenses and permits when the local determination was arbitrary or unreasonable, in the sense that termination of the authorization granted was not necessary to protect the public health, safety, morality or welfare.
>
> 3 Antieau, *Municipal Corporation Law*, Section 24.42 (1979).

Provisions of ordinances providing for forfeiture of licenses must be reasonable, or they will not be upheld. *McInerney* v. *Denver*, 17 Colo. 302, 29 P. 516 (1892).

Under the Greeley Charter and ordinances, the discretion vested in the City Council to revoke permits is wide, but it may not be exercised in an arbitrary, unreasonable or discriminatory manner. *Restaurants of Wichita, Inc.* v. *Wichita*, 215 Kan., 636, 527 P.2d 969 (1974); *Marrone* v. *City Manager*, 329 Mass., 378, 108 N.E. 2d 553 (1952).

WAS THE REVOCATION OF THE PERMIT OF GREELEY VIDEO, INC. VALID?

Civil Action No. 80 CV 859 challenges the validity of the revocation of the permit of Greeley Video. It is brought under Rule 106, C.R.C.P., so the review by this Court is limited to a determination of whether the City Council, in revoking the permit, exceeded its jurisdiction or abused its discretion. The question in such a case is not whether the Court agrees with the decision of the City Council, but whether the action of the City Council was supported by competent evidence.

The absence of finding by the City Council is not fatal to its decision if there is evidence in the record which supports its conclusions. *Cooper* v. *Civil Service Commission*, Colo. App., 604 P.2d 1186 (1979). The record of the City Council action should not be so vague, however, as to prevent the reviewing court from determining the basis for their action. *Board of County Commissioners* v. *Salardino*, 136 Colo. 421, 318 P. 596 (1957); *Geer* v. *Presto*, 135 Colo. 536, 313 P.2d 980 (1957).

In the revocation proceedings, a very large number of ordinance and permit violations were charged to Greeley Video. Although no formal statement of charges was ever presented, in the opening statement of the attorneys presenting the evidence against Greeley Video before the Council, reference was made to a substantial number of claimed violations. During the hearings before the Council additional claimed violations surfaced.

One of the principal problems confronted by this Court in reviewing this case is the fact that despite the large variety of charges available, the order revoking the permit contains no statement whatsoever setting forth the specific violations upon which it is based. This Court, accordingly, has no clear basis for deciding whether the conclusions of Council justified revoking the permit.

Although this Court must review the case on the record, it may consider material facts which stand out so clearly that this Court cannot excape noticing them. It may give proper consideration to such facts as necessary to determine whether

the board has exceeded its jurisdiction or abused its discretion. This is not substituting the discretion of the Court for the decision of the City Council. *Board of Adjustment* v. *Perlmutter*, 131 Colo. 230, 280 P.2d 1107 (1955).

The Court noted that the City had apparently condoned a number of the acts which were charged as violations in the revocation proceedings. Some of the delays complained of were occasioned at least in part by acts of the City or its agents regarding moratorium, permit delays or refusals and the like. Virtually all of the major violations were known to the Council at the time it conducted its extensive review of the permit. Yet the Council apparently felt that such defaults and violations did not render Greeley Video, Inc. unfit to conduct a cable TV business in Greeley. Council permitted the participation of Greeley Video in its review proceedings, visited facilities operated by the parent organization of Greeley Video, accepted contributions from Greeley Video, Inc. to the travel expenses of its members, and apparently considered Greeley Video, Inc. second only to the favored Storer firm in making its final selection.

These facts, and record as a whole, lead this Court inescapably to the conclusion that the real reason for the revocation of the Greeley Video permit was not the commission of the defaults and violations considered at the hearing, but rather the desire of the Council to carry out its resolution selecting "Storer Cable TV as the cable TV operator for Greeley."

The Court in no way impugns the motives of the members of City Council. The Court is certain that the members conscientiously believe that the Storer firm would be the better operator. The Court surmises from the arguments of counsel in this case that the reason for reticence on the point is concern about possible antitrust violations. Whether such concerns are well founded is not for this Court to say as antitrust matters are principally the concern of the Federal Courts.

The question before this Court is whether the City Council was justified under the ordinance scheme presently in force in the City of Greeley in revoking the permit previously granted to Greeley Video in order to enable Storer Cable TV to be *the* cable TV operator for Greeley.

But Chapter 7A of the Greeley Code of Ordinances does not establish an exclusive license system. The permits under that chapter are specifically stated to be nonexclusive and the City has reserved the right to grant similar permits to others. Thus the revocation of the permit of Greeley Video is not necessary to enable Storer Cable TV, to be *a* cable TV operator in Greeley, as envisioned by Chapter 7A of the ordinances. It would, of course, be necessary to enable Storer Cable TV to be *the* cable TV operator for Greeley.

The revocation of the permit of Greeley Video, Inc., is unnecessary to achieve the purposes of Chapter 7A of the Greeley Code of Ordinances, therefore, it must be considered to be arbitrary or unreasonable. 3 Antieau, *Municipal Corporation Law*, Section 24.42.

The City Council may believe that under present circumstances a competitive system is not feasible for cable TV in the City of Greeley. If so, its recourse is to alter the ordinance. *Bauer* v. *Wheat Ridge*, 182 Colo. 324, 513 P.2d 203 (1973). It may be noted, however, that nonexclusive arrangements in local cable TV franchising are recommended by some authorities as a method of assuring continuing technical improvements. Note, 27 *Drake Law Review* 401 (1977-1978).

Under the ordinance system presently in force in the City of Greeley the action of the City Council in revoking the permit of Greeley Video, Inc. is in excess of that body's jurisdiction, and is an abuse of its discretion. Accordingly, the Court will enter judgment that the revocation is void.

CONCLUSION

Judgments will enter in these cases in accordance with the foregoing Memorandum.

DATED January 30, 1981.

BY THE COURT:

_____

District Judge

IN THE DISTRICT COURT
IN AND FOR THE
COUNTY OF WELD AND STATE OF COLORADO

Civil Action No. 80 CV 859

GREELEY VIDEO, INC., a Colorado corporation,

Plaintiff,

vs.

THE CITY COUNCIL OF THE CITY OF GREELEY, THE MEMBERS OF THE CITY COUNCIL OF THE CITY OF GREELEY, in their capacity as councilpersons, and THE CITY OF GREELEY,

Defendants.

JUDGMENT

Based on the Memorandum of Decision of the Court filed concurrently herewith, and the Findings of Fact and Conclusions of Law set forth therein, it is

ORDERED, ADJUDGED AND DECREED by the Court as follows:

1. The action of the defendant City Council and defendant members thereof in adopting The City of Greeley, Colorado, Resolution No. 57, 1980, entitled A Resolution Revoking the Cable T. V. Permit Issued to Greeley Video, Inc., was an abuse of the discretion of said defendants and was void.

2. The permit for the installation of cable television which was issued to plaintiff by resolution of the defendant City Council dated January 16, 1968, is unrevoked.

3. Plaintiff shall have judgment for its costs.

Dated January 30, 1981.

BY THE COURT:

District Judge

IN THE DISTRICT COURT
IN AND FOR THE
COUNTY OF WELD AND STATE OF COLORADO

Civil Action No. 80 CV 270

CITY OF GREELEY, a Municipal corporation,
Plaintiff,
vs.
GREELEY VIDEO, INC., a Colorado corporation,
Defendant.

JUDGMENT

Based on the Memorandum of Decision of the Court filed concurrently herewith, and the Findings of Fact and Conclusions of Law set forth therein, it is

ORDERED, ADJUDGED and DECREED by the Court as follows:

1. Defendant has not voluntarily abandoned and surrendered the revocable permit to operate a cable television system in the City of Greeley, Colorado, granted by plaintiff to defendant on January 16, 1968, and has not waived and relinquished its right, title or interest therein.

2. Defendant is not estopped from denying that it has abandoned and relinquished the said revocable permit, and is not estopped from asserting any right, title or interest therein.

3. The said revocable permit may be revoked by plaintiff for reasonable cause, in the discretion of the City Council of plaintiff.

4. Defendant shall have judgment for its costs.

Dated January 30, 1981.

BY THE COURT:

District Judge

MUNICIPAL AUTHORITY

	Source of Authority				Extent of Authority			
	Directly from Constitution	From Legislature authorized by Constitution	From Legislature only	Home rule powers granted by legislature	Home rule gives complete local authority if no conflict with state legislation	Ordinance prevails over conflicting statute on matters of local concern	Charter ordinance prevails over conflicting special state legislation	City can act on statewide concerns in absence of prohibitions preemption by State
Alabama[1,*]			X	X				
Alaska[2]	X				X			X
Arizona[3]	X				X	X		X
Arkansas[4]			X		X			
California[5]	X				X	X		X
Colorado[6]	X				X	X		
Connecticut[7]		X			X	X		
Delaware[8]			X		X			
Florida[9]		X		X				
Georgia[10]		X			X		X	
Hawaii[11]		X			X		X	
Idaho[12]	X				X		X	
Illinois[13]	X				X			
Indiana[14]			X		X			
Iowa[15]			X	X				
Kansas[16]	X				X		X	
Kentucky[17]			X	X				
Louisiana[18]		X		X				
Maine[19]	X				X			X
Maryland[20]	X				X		X	
Massachusetts[21]	X				X		X	X
Michigan[22]	X				X			X
Minnesota[23]	X				X		X	
Mississippi[24]			X	X				
Missouri[25]	X				X			
Montana[26]	X				X			
Nebraska[27]	X				X	X		
Nevada[28]		X		X				
New Hampshire[29]		X		X				
New Jersey[30]	X				X		X	
New Mexico[31]	X				X	X		
New York[32]		X			X			
North Carolina[33]		X		X				
North Dakota[34]		X		X				
Ohio[35]	X				X	X		
Oklahoma[36]	X				X	X		
Oregon[37]	X				X	X		
Pennsylvania[38]	X			X				
Rhode Island[39]	X				X		X	
South Carolina[40]		X		X				
South Dakota[41]	X				X			
Tennessee[42]	X				X		X	
Texas[43]	X				X		X	
Utah[44]	X				X		X	
Vermont[45]			X	X				
Virginia[46]		X		X				
Washington[47]	X				X		X	
West Virginia[48]		X		X				
Wisconsin[49]	X				X			
Wyoming[50]	X				X		X	
Puerto Rico[51]			X		X			

* Supporting footnotes located on reverse side of this chart

[1] Ala. Code § 11-40-1; *Colvin* v. *Ward*, 189 Ala. 198, 66 So. 98 (1914).

[2] Alas. Const. art. X, § 11; *Jefferson* v. *State*, Sup. Ct. Op. No. 1084, 527 P.2d 37 (Alas. 1974); *Rubey* v. *Fairbanks*, 456 P.2d 570 (Alas. 1969).

[3] Ariz. Const. art. XIII, §§ 2-3; *City of Tuscon* v. *Arizona Alpha of Sigma Alpha Epsilon*, 67 Ariz. 330, 195 P.2d 562 (1948).

[4] Ark. Stat. Ann. §§ 19-1042, 19-1043; *Beharse* v. *City of Blytheville*, 254 Ark. 382, 493 S.W.2d 708 (1973).

[5] Cal. Const. art. XI, §§ 2,3,5-7; *Sonoma County Organization of Public Employees* v. *County of Sonoma*, 23 Cal.3d 296, 152 Cal.Rptr. 903, 591 P.2d 1 (1979); *Bishop* v. *San Jose*, 1 Cal.3d 56, 81 Cal.Rptr. 465, 460 P.2d 137 (1969).

[6] Colo. Const. art XX, § 6; *Delong* v. *City & County of Denver*, 195 Colo. 27, 576 P.2d 537 (1978);*Century Electric Service and Repair* v. *Stone*, 193 Colo. 181, 564 P.2d 953 (1977).

[7] Conn. Const. art X, § 1; Conn. Gen. Stat. Ann. §§ 7-188, 7-191a, 7-194; *Caulfield* v. *Noble*, 178 Conn. 81, 420 A.2d 1160 (1979).

[8] Del. Code. Ann. tit. 22, § 801-602; *Gage* v. *City of Wilmington*, 293 A.2d 555 (Del. Supr. 1972).

[9] Fla. Const. art. VIII, § 2; *State* v. *Roca*, 172 So.2d 230 (Fla. 1965).

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[17] Ky. Rev. Stat. Ann. §§ 83.410-63.420; *Reconstruction Finance Corp.* v. *City of Richmond*, 249 Ky. 787, 61 S.W.2d 631 (1933).

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[30] N.J. Const. art. IV, § 7; *Inganamort* v. *Burough of Fort Lee*, 62 N.J. 521, 303 A.2d 298 (1973) (although case doesn't find conflict between ordinance and statute).

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[38] Pa. Const. art. IX, § 2; *United Tavern Owners of Philadelphia* v. *School Dist. of Philadelphia*, 441 Pa. 274, 272 A.2d 868 (1971).

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[41] S.D. Const. art. IX, § 2.

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[43] Tex. Const. art. XI, § 6; *Lower Colorado River Auth.* v. *City of San Marcos*, 523 S.W. 2d 641 (1975).

[44] Utah Const. art. XI, § 5; *Wadsworth* v. *Santaquin City*, 83 Utah 321, 28 P.2d 161 (1933) (although case deals with "general law" city).

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[49] Wisc. Const. art. XI, § 3; *Glendale Professional Policemen's Assoc.* v. *City of Glendale*, 83 Wisc. 2d 90, 264 N.W.2d 594 (1978).

[50] Wyo. Const. art. XIII, § 1.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

COMMUNITY COMMUNICATIONS COMPANY, INC.,
Petitioner,

v.

CITY OF BOULDER, COLORADO,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

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QUESTION PRESENTED

Where the state constitution grants autonomy over local matters to a home rule city, does the City Council's valid exercise of those powers to enact an Ordinance halting cable T.V. construction within the City limits for 90 days constitute an act of government which is beyond antitrust attack?

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COUNTERSTATEMENT OF THE CASE

This case arises from Community Communications Company's ("CCC") antitrust challenge to legislative acts of the City of Boulder, Colorado, pursuant to its powers of self-government guaranteed by the Colorado Constitution. Specifically at issue in this appeal are two City ordinances[1] which amended CCC's existing cable T.V. permit to halt new cable construction for ninety days so that the City could proceed with a request for proposals from additional operators.

CCC is a wholly-owned subsidiary of Telecommunications, Inc. ("TCI"), the third largest cable T.V. operator in the United States with over 130 monopoly cable systems nationwide.[2] The City adopted the moratorium Ordinance because CCC's newly-announced "wiring" of all of Boulder threatened to foreclose additional cable T.V. operators from entering the Boulder market for the foreseeable future.

CCC brought this antitrust action to enjoin implementation of the City moratorium Ordinance. The trial court found that the Ordinance violated the Sherman Act and

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[1] Ordinance Nos. 4472 and 4473 are reprinted in the Appendix to the Petition ("App. Pet.") at A-55 to A-65. These two ordinances are hereinafter referred to collectively as the challenged Ordinance.

[2] Boulder Ex. E-1, Appendix to CCC Proposal to Boulder (offered March 6 Tr. 2; received March 6 Tr. 6). Testimony at the hearing on the motion for preliminary injunction is referred to by the witness name, the date, and the page of the hearing transcript (*e.g.*, "Sparkman, March 4 Tr. ____"); deposition testimony is referred to by witness name and page of deposition transcript (*e.g.*, "Westdyke Dep. ____"); hearing exhibits are referred to as "Boulder Ex. ____"; the Joint Appendix is referred to as "J.A. ____"; the Petitioner's Brief is referred to as "P. Br. ____"; and the *amici curiae* brief of Colorado and other states is referred to as "A.G. Br. ____."

enjoined the City from taking "unilateral action" to restrict CCC's cable T.V. business. The Court of Appeals for the Tenth Circuit reversed, holding that the City's action was not subject to antitrust attack under the state action doctrine of *Parker* v. *Brown*, 317 U.S. 341 (1943).

Background

Respondent, the City of Boulder, Colorado, is a "home rule" city of approximately 77,000 people organized as a locally autonomous governmental unit under Article XX, Section 6 of the Colorado Constitution (App. Pet. A-47 to A-49), which confers on the City "the full right of self-government in both local and municipal matters." Under its charter, all legislative powers of the City are exercised by a nine-member City Council elected by Boulder's citizens. BOULDER, COLO., CHARTER §§ 5, 11 (1965 rev. ed.). In recent years the Boulder City Council has convened at least weekly to consider local affairs and to take legislative action on a variety of local matters.[3] In carrying out these local governmental functions, the City issues many different types of licenses, permits and franchises.

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[3] These include local regulation of: intoxicating liquors (BOULDER, COLO., CODE ch. 3 (rev. ed. 1965)), animals and fowl (*id.* ch. 4), buildings (*id.* ch. 5), storm drainage and flood control (*id.* ch. 8), the fire department (*id.* ch. 10), food and food establishments (*id.* ch. 12), gambling (*id.* ch. 13), refuse and weeds (*id.* ch. 14), local improvements (*id.* ch. 17), milk (*id.* ch. 18), minors (*id.* ch. 19), motor vehicles and local traffic (*id.* ch. 20), parks-recreation-open space (*id.* ch. 22), plumbing and mechanical codes (*id.* ch. 23), poles and wires (*id.* ch. 24), police (*id.* ch. 25), public amusements (*id.* ch. 26), local railroad traffic control (*id.* ch. 28), rodent control (*id.* ch. 29), junk dealers (*id.* ch. 30), streets and sidewalks (*id.* ch. 31), subdivisions (*id.* ch. 32), taxicabs (*id.* ch. 33), trees, plants and shrubs (*id.* ch. 34), water and sewers (*id.* ch. 35), weapons (*id.* ch. 36), zoning (*id.* ch. 37), mobile homes (*id.* ch. 38), local airports (*id.* ch. 39), local sales

Pursuant to a 1964 City permit, CCC operates the only cable T.V. system in the City of Boulder. From 1966 to May, 1979, this system served about 10% of the City's residents. In 1979, CCC announced its plans to "wire" the balance of the City (Boulder Ex. K; offered March 4 Tr. 41; received March 4 Tr. 42) and another cable T.V. company, Boulder Communications Company ("BCC"), approached the City about building a system in Boulder. (J.A. 12-14).

In response to these developments, the City Council hired a cable T.V. consultant (Sample, March 4 Tr. 181) and began a five-month study to determine the most effective way to obtain "the best state-of-the-art" cable T.V. services for its citizens. (Correll Dep. 54). CCC's expansion plans (Boulder Ex. M; offered March 4 Tr. 83; received March 4 Tr. 84) did not include certain cable services — such as automated home fire and burglar alarms, two-way transmission capability and sufficient channel capacity for future development — and the Council determined that it should conduct a supplemental request for bids to see if such services could be obtained from additional operators. (App. Pet. A-55 to A-56, 6th ¶).

The transcripts of the City Council's four lengthy meetings demonstrate its desire that competition help the City achieve the goal of "state-of-the-art" cable T.V.

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and use taxes (*id.* ch. 40), electrical building code (*id.* ch. 41), pawnbrokers (*id.* ch. 42), traffic engineering (*id.* ch. 43), ambulance service (*id.* ch. 44), housing code (*id.* ch. 45), public improvements and facilities (*id.* ch. 46), public accommodations tax (*id.* ch. 47), sign code (*id.* ch. 48), tax refund program (*id.* ch. 49), an admissions tax (*id.* ch. 50) and a historic preservation code (*id.* ch. 51).

(J.A. 31).[4] The Council was aware, however, that cable T.V. systems tended to operate as monopolies and that CCC enjoyed a significant advantage over any prospective competitors because it was already in place in the City, had a substantial headstart in "wiring," and had already taken steps to expand.[5] The City Council feared that these factors would effectively preclude the entry of additional cable T.V. operators into the Boulder market.[6]

During the fall of 1979, while the City Council was deliberating, CCC accelerated its construction schedule to capture more of the market before competitors could successfully enter. (Westdyke, March 4 Tr. 37). "The purpose of CCC's continued installation was to blanket the market before other firms had an opportunity to compete."[7] On December 1, 1979, CCC's President told a

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[4] CCC's Statement of the Case (P. Br. 2-16) offers an array of factually unsupported contentions and marked overstatement. For example, CCC characterizes the City's purpose (P. Br. 6, 1st ¶) as opposed to "open market competition" and as seeking to replace CCC with a single, more "amenable" operator. CCC cites neither the Joint Appendix nor the record as support for these contentions and, in fact, the deliberations of the City Council demonstrate that they are unsupportable. *See e.g.*, Boulder Ex. X at 14, 18, 19, 21, 29, 32-33, 37 (offered March 4 Tr. 171; received March 4 Tr. 172); Boulder Ex. Y at 22, 29, 44 (offered March 4 Tr. 171; received March 4 Tr. 172); Boulder Ex. A-1 at 62-63, 73 (offered March 6 Tr. 5; received March 6 Tr. 5).

[5] *See, e.g.*, Boulder Ex. X at 13-15, 19, 22-24, 37-38, 41-43; Boulder Ex. Y at 20-21, 26-30; Boulder Ex. Z at 5-6, 11, 16, 23-25 (offered March 6 Tr. 2; received March 6 Tr. 5).

[6] "I see an excellent opportunity for them to circumvent anybody else from coming in by just getting out and running some lines." (Council Member Boland, Boulder Ex. X at 14).

[7] March 3, 1980 Memorandum of The Colorado Attorney General As *Amicus Curiae* In Opposition To Plaintiff's Motion For Temporary Restraining Order 2.

City official that if Boulder tried to get other cable T.V. operators to accept City permits, "it might make [CCC] build a little faster. They didn't mind. *They would like to be the only show in town.*" (J.A. 80; emphasis added).

Faced with this situation, on December 18, 1979, the City Council enacted the challenged Ordinance amending CCC's permit to halt CCC's new cable T.V. construc- for ninety days.[8] On January 11, 1980, the City requested proposals from over 50 cable operators (Westdyke, March 4 Tr. 43) and placed advertisements in the *Wall Street Journal* (Varnes, March 6 Tr. 20) in order to determine whether additional services were available from other operators. (Correll Dep. 44, 55; Sample, March 4 Tr. 184). The City requested proposals for "fire and burglar alarm services, traffic control, home shopping [and] remote medical diagnosis." (Boulder Ex. A, Form 3D; offered March 6 Tr. 2; received March 6 Tr. 3). Three cable operators (other than CCC) responded; two of these committed to provide several of the cable services which CCC had refused.[9]

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[8] [T]he long range purpose and hoped-for effect of the moratorium was to break TCI's monopoly of the Boulder cable t.v. market, which is undoubtedly the reason TCI has so strenuously opposed the moratorium all along.

April 22, 1980 *Amicus Curiae* Brief of the Colorado Attorney General 30; *see also id.* at 5; May 12, 1980 *Amicus Curiae* Reply Brief of the Colorado Attorney General 16-17.

[9] *E.g.*, burglar and fire alarms, built-in two-way capability throughout the system and more than 50 channels (as compared with CCC's offer of 35 channels). Boulder Ex. B-1 at 5-8 (offered March 6 Tr. 6; received March 6 Tr. 5); Boulder Ex. C-1 at 3c-3o (offered March 6 Tr. 6; received March 6 Tr. 6). CCC declined to commit to these services. Boulder Ex. E-1 at 27.

The Litigation

On January 15, 1980, CCC brought this antitrust action against the City to overturn the moratorium Ordinance. Although CCC claimed that in adopting the Ordinance the City had conspired with BCC, the trial court found that the "evidence is insufficient to establish a probability that the plaintiff will prevail on this claim." *Community Communications Co.* v. *City of Boulder,* 485 F.Supp. 1035, 1038 (D. Colo. 1980) (App. Pet. A-36, A-40). Indeed, the preliminary injunction appealed from enjoined the City from taking only "unilateral" action to restrict CCC's cable business. (App. Pet. A-46).

Evidence adduced at the hearing on CCC's motion for a preliminary injunction demonstrated that cable T.V. tends to be a monopoly service in each locality[10] and that CCC's uninterrupted "wiring" of Boulder threatened to make it "the only show in town."[11]

Despite finding no "conspiracy," and without evaluating the challenged Ordinance under the Rule of Reason,

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[10] Virtually all of the nation's cable systems enjoy *de facto* monopolies; only about six of approximately 6000 systems involve head-to-head competition. (J.A. 77-78; Pilnick, March 5 Tr. 38-39, 129, 132, 151; Sample, March 4 Tr. 218; Westdyke Dep. 34-39). The testimony repeatedly characterized municipal cable T.V. service as a monopoly (Pilnick, March 5 Tr. 96, 129, 132, 151, 166-67, 181, and 187) and emphasized that:

> If it was too far gone, if the first company had so much of an advantage either in construction itself, or being ready for construction, then you could issue a thousand permits, and of the thousand the remaining 999 permittees would really have no practical chance of building an operating system.

(J.A. 79; *see also* Westdyke, March 4 Tr. 96, 100).

[11] Market penetration rates are not high enough to cover the capital and operating costs of two directly competing systems. (J.A. 76-77; Pilnick, March 5 Tr. 40, 54-55). An additional barrier to competition

on March 17, 1980, the trial court preliminarily enjoined enforcement of the Ordinance as a violation of the Sherman Act:

> The [City's] motivation may be to foster competition in the long run, but the direct and immediate effect is a restraint of trade and an artificial and unreasonable geographical market allocation.

(App. Pet. A-43). The trial court also held that the City's action was not immune from antitrust challenge under *Parker* v. *Brown*, 317 U.S. 341 (1943). On May 28, 1980, the court of appeals reversed the preliminary injunction, holding that the challenged City Ordinance was immune from antitrust liability under *Parker. Community Communications Co.* v. *City of Boulder*, 630 F.2d 704 (10th Cir. 1980) (App. Pet. A-1).

Following the court of appeals' decision, CCC renewed construction in Boulder and the other companies that had submitted bids refused to accept a City permit for any area where CCC was ready to "wire". (Boulder Ex. I-2d at 1098-1102, 1110-11). On recommendation of the Antitrust Section of the Colorado Attorney General's office (Boulder Ex. I-2d at 1199-1201), the Council adopted Ordinance No. 4515 (J.A. 69-75) dividing the City into cable T.V. districts and assigning one district to CCC, which it admits is economically viable. *See* Stipulation of Counsel filed July 21, 1980. The Council, agreeing with the Colorado Attorney General that direct competition was not possible at the present time, adopted the

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is the cost associated with the rearrangement of lines on utility poles when a second cable is added and, in areas where cable must be laid underground, the extra costs associated with digging up roads and homeowners' property after the first cable is in place, including accidental cutting of lines and resultant repairs. (*Id.* at 33-37; Sample, March 4 Tr. 226; Olson, March 6 Tr. 58-63).

districting system in order to provide Boulder's citizens with better cable service in several districts and with some of the benefits of indirect competition. (J.A. 70-71).[12]

SUMMARY OF THE ARGUMENT

1. Boulder's enactment of the challenged Ordinance was an exercise of its home rule power, which gives the City "'*every power* theretofore possessed by the legislature . . . in local and municipal affairs.'" *Denver Urban Renewal Authority* v. *Byrne*, 9 COLO. LAW. 2720, 2722 (Colo. Sup. Ct. Oct. 27, 1980). These powers of self-government are guaranteed to Boulder and its citizens by an amendment to the Colorado Constitution which was adopted by referendum for the express purpose of freeing cities from the need to obtain a specific, detailed authorization from the General Assembly for each municipal act.

2. The fact that the state's legislative authority over local matters is exercised by a constitutionally authorized home rule city, rather than by the General Assembly, does not diminish the applicability of the state action doctrine of *Parker* v. *Brown*, 317 U.S. 341 (1943). Moreover, even under *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389 (1978), the Ordinance challenged here is not subject to antitrust attack. It is not necessary that a state's political subdivision "be able to point to a

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[12] On August 25, 1980, the trial court enjoined the City from enforcing Ordinance No. 4515 on Sherman Act and first amendment grounds. The City appealed; the matter has been briefed and argued before the Tenth Circuit; and on May 15, 1981, the court of appeals *sua sponte* enjoined CCC from further cable T.V. construction pending appeal. Boulder Ex. I-2d, referred to above, was offered and received in evidence at August 21 Tr. 6, 74.

specific, detailed legislative authorization before it properly may assert a *Parker* defense to an antitrust suit." 435 U.S. at 415. An adequate state mandate for such municipal acts exists when the power and authority conferred on the city demonstrate that the challenged actions were "comprehended" within the city's authority or "contemplated" in the grant of its powers. Boulder's self-governing power under the Colorado Constitution amply satisfies this requirement.

Petitioner here attempts to transform the *Lafayette* test into a wooden rule: a home rule city's governmental authorization must be renewed by the General Assembly for each "specific *kind* of action in a *particular* area." (P. Br. 35). Such a "ticket stamping" requirement for Colorado home rule cities is not necessary under *City of Lafayette* and would displace the decision of the people of Colorado to allocate the state's legislative power over local matters to the elected representatives of the local citizens. If the *City of Lafayette* test can be so interpreted, however, then it must be clarified so that Colorado's home rule cities are not forced to abandon their local autonomy in order to qualify for *Parker* immunity. Such clarification would be in keeping with the history and purpose of the Sherman Act and with the principles of Federalism which underlie our system of government.

3. Congress never intended the Sherman Act to apply to legislative acts of cities, such as the Ordinance challenged here. The antitrust statutes were intended to reach "these great trusts, these great corporations, these large moneyed institutions" (21 CONG. REC. 2562 (1890)), and not to reach "political activity." *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 137 (1961). Moreover, the substantive antitrust law is itself designed to apply to private restraints of trade and thus balances the procompetitive

and anticompetitive effects of the challenged restraint. Legislative acts designed to achieve important local police power objectives necessarily cause some degree of disruption of free market forces, and cannot, in the usual case, be justified by any discernible procompetitive impact. For example, local governments may restrain the minimum size of building lots, not because such a restraint will promote competition in that market, but in order to assure that the local community is more spacious.

In addition, such actions taken by home rule cities cannot, by the very nature of constitutional home rule powers, be based upon specific, detailed authorizations from the state legislature. Thus, the adoption of Petitioner's test requiring a specific, detailed legislative authorization for each particular act by a home rule city would turn every disappointed applicant for a city permit into a potential federal court antitrust plaintiff; produce bad antitrust law; and chill the development of legitimate local legislative choices because of the *in terrorem* effect of the threat of protracted antitrust litigation (including the significant, non-recoverable expenses of defense, as well as the risk of paying treble damages and attorneys' fees from the public taxes).

4. On a more basic level, a judicial interpretation requiring home rule cities to go back to the state legislature for a specific, detailed authorization for each local legislative act with any anticompetitive consequences, would interfere with one of the central attributes of state sovereignty — the allocation and structuring of the state's legislative power. Moreover, the direct application of the Sherman Act to cities' legislative enactments would strike at the heart of the political function of local, self-governing subdivisions of the state. *See, e.g., National League of Cities* v. *Usery,* 426 U.S. 833 (1976).

Such federal court review, under the aegis of the antitrust laws, of every legislative enactment of city government would reinstate the same kind of judicial economic second-guessing which the country endured for years under the theory of substantive due process.

For all these reasons, the judgment of the court of appeals should be affirmed.

ARGUMENT

I. UNDER THE DECISIONS OF THIS COURT, THE GOVERNMENTAL ACTS OF COLORADO CITIES TAKEN PURSUANT TO CONSTITUTIONALLY GUARANTEED HOME RULE POWERS ARE NOT SUBJECT TO ANTITRUST ATTACK.

Constitutionally guaranteed local autonomy for home rule cities is deeply embedded in Colorado's system of government. The basic premise of home rule is that democracy works best with respect to local matters when it is in the hands of local citizens. Such autonomy is particularly appropriate in the case of cable T.V., which poses essentially local problems.

In these circumstances, the City's cable T.V. moratorium Ordinance is an "act of government" by the City, acting as the state on local matters, and therefore is not subject to antitrust attack under the doctrine of *Parker* v. *Brown,* 317 U.S. 341, 352 (1943). Moreover, the state constitution's guarantee of local autonomy in such matters fulfills the requirement of *City of Lafayette* v. *Louisiana Power & Light Co.,* 435 U.S. 389, 413 (1978), that the City's act be "comprehended within the powers granted" to the City or "contemplated" in the grant of its authorities. 435 U.S. at 394, 415. In order to appreciate the manner in which the challenged Ordinance is "comprehended within the powers granted" to the city, we must begin by examining the purpose of

municipal home rule and its role in our system of government.

A. The Ordinance Challenged Here Is A Legislative Enactment Of Boulder's Home Rule Government Acting As The State With Respect To Local Matters.

From the earliest times of the Republic, cities have exercised a substantial degree of local autonomy. In 1835 de Tocqueville observed that:

> [Townships] are independent in all that concerns themselves alone; and amongst the inhabitants of New England, I believe that *not a man is to be found who would acknowledge that the state has any right to interfere in their town affairs.*

A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 38 (Hacker ed. 1964) (emphasis added). As the country grew and urbanized, however, local autonomy gave way to control by the state legislatures.

> It was during the second half of the nineteenth century that state legislatures across the country established by usage the power which, from the beginning, they had in theory. As urban areas increased in number and population, fed by immigrants from the rural areas and abroad, governmental activity increased. . . . Increasingly, intervention by the state legislature was sought. . . . Legislation descended into regulation of the minutest details of municipal government.

Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts,* 48 MINN. L. REV. 643, 647 (1964) (footnotes omitted) (hereinafter "*Sandalow*").

In Colorado, the General Assembly's exercise of control over local matters in the City of Denver proved particularly troublesome. Denver's Charter became the subject of "constant tinkering" by the General Assembly. J.

RUSH, THE CITY-COUNTY CONSOLIDATED 143 (1941) (hereinafter "*Rush*"). "Specific legislative approval was necessary for every power which [the City] wished to exercise." Hornbein, *Denver's Struggle for Home Rule,* 48 THE COLORADO MAGAZINE 337, 346 (1971) (hereinafter "*Hornbein*").

In 1889 and 1891, the Colorado General Assembly adopted "special" legislation creating two Denver Boards which gave the Governor control over all of Denver's local public works and local fire and police services. See Klemme, *The Powers of Home Rule Cities in Colorado,* 36 U. COLO. L. REV. 321, 324 (1964) (hereinafter "*Klemme*"). With the establishment of these two boards, "Denver came entirely within the shadow of the statehouse." *Hornbein* at 338.[13]

For a decade or more a "bitter struggle" between the General Assembly and the City of Denver ensued. Johnson, *Municipal Home-Rule in Colorado: Self-Determination* v. *State Supremacy,* 37 DICTA 240, 245 (1960) (hereinafter "*Johnson*"). In the words of a contemporary observer:

> The City of Denver had . . . been reduced to a position of political serfdom. So intolerable had conditions become that its people started a strong agitation for "Home Rule."

Rush at 329-30.

At about the same time, similar home rule movements sprang up around the country:

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[13] "Another cause of irritation was the situation as to the public schools." *Rush* at 330. In the 1890's, Denver included six school districts which were separately financed and administered. The City had repeatedly been denied authorization by the state legislature to consolidate these separate schools for greater efficiency and uniformity of education. *Id.*

> Cities are ruled by legislatures from the State capital; they are governed, that is, by men from the country who know nothing of city problems or city life, and have indeed no real conception of just what cities need. In league with them . . . are the public utility corporations and political machines. *The first requisite, therefore, for municipal reform, is home rule.*[14]

Soon the popular demand for local autonomy became widespread: *"Everywhere the first battle was the struggle for 'home rule.'"*[15]

> In due course, a reaction set in. Local governments — more accurately, some of their citizens — sought, and frequently developed sufficient political strength to obtain, constitutional recognition of *areas of assured local autonomy.*

Sandalow at 648 (emphasis added). This is precisely what happened in Colorado:

> The efforts of some of Denver's citizens to alleviate the city's problems led eventually to the home rule movement, culminating in the adoption in 1902 of article XX. Thus, as seems generally true in other states, *home rule was adopted in Colorado for the purpose of relieving municipalities from their dependence on legislative action for their form of organization and powers and from the resultant interference in municipal affairs such dependence made possible.*

Klemme at 324 (footnotes omitted; emphasis added); *see also Johnson* at 240; *Hornbein* at 349; *Rush* at 331-32.

By state-wide referendum on November 4, 1902, the people of Colorado voted to add a new Article XX to

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[14] *Letters of Brand Whitlock* (Mayor of Toledo 1904-1913), in 2 S. MORISON, H. COMMAGER & W. LEUCHTENBURG, THE GROWTH OF THE AMERICAN REPUBLIC 289 (6th ed. 1969).

[15] H. FAULKNER, POLITICS, REFORM AND EXPANSION (1890-1900) 27 (1st ed. 1959).

their Constitution to assure local autonomy for the City of Denver. In 1912, another state-wide referendum broadened Article XX so that other qualifying cities and towns could elect to be governed by home rule. On October 30, 1917, the people of the City of Boulder elected home rule status.

Several other states also adopted a form of municipal home rule and, although the nature and scope of the powers conferred differ significantly (see discussion *infra* at 19 n.19), the underlying purpose is the same:

> (1) to stop legislative interference with affairs purely local, and (2) to foster and develop among citizens a full sense of civic duty and responsibility. Local electors should have better knowledge of, and hence should be more competent to manage, local matters, and moreover, state legislatures are neither interested in nor informed as to local conditions.

2 E. McQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 9.08 (3d ed. 1979); *see also,* C. PATTON, THE BATTLE FOR MUNICIPAL REFORM 16-17 (1969).

In Colorado the purpose of freeing home rule cities from the General Assembly's interference is stated in the Colorado Constitution itself:

> *Such charter and the ordinances* made pursuant thereto in such [local and municipal] matters *shall supersede* within the territorial limits and other jurisdiction of said city or town *any law of the State in conflict therewith.*
>
> . . . .
>
> *It is the intention of this article to grant and confirm to the people of all municipalities* coming within its provisions *the full right of self-government in both local and municipal matters* and the enumeration herein of certain powers shall not be construed to deny such cities and towns, and to the people thereof, any right or

> power essential or proper to the full exercise of such right.

COLO. CONST. art. XX, § 6 (emphasis added).

The Colorado Supreme Court has consistently interpreted this provision in keeping with its history as guaranteeing the independent authority of home rule cities over local matters:

> On such questions of local concern, a home rule city is vested with the plenary power of self-government . . . .
>
> > "In numerous opinions handed down by this court extended over a period of fifty years, it has been made perfectly clear that when the people adopted Article XX they conferred *every power* theretofore possessed by the legislature to authorize municipalities to function in local and municipal affairs. (Emphasis in original.) . . ."
>
> *Thus, by virtue of Article XX, a home rule city is not inferior to the General Assembly concerning its local and municipal affairs.*

Denver Urban Renewal Authority v. *Byrne,* 9 COLO. LAW. 2720, 2722 (Colo. Sup. Ct. Oct. 27, 1980) (citation omitted; emphasis added); *Four-County Metro. Capital Improvement Dist.* v. *Board of County Commissioners,* 149 Colo. 284, 294, 369 P.2d 67, 72 (1962).

In the present action, the court of appeals properly determined that Boulder's Ordinance halting new cable T.V. construction within the City's boundaries was a matter of "local concern" under the City's home rule powers:

> The franchise of the plaintiff cable T.V. company is necessarily limited to service within the City of Boulder. The services provided are limited to City

> residents through the use of City streets and ways. The matter or subject is a local one.

(App. Pet. A-6).[16]

Cable T.V. operates in the public right-of-way, and thus has always been subject to local regulation through franchises and permits. *See United States* v. *Southwestern Cable Co.*, 392 U.S. 159, 163 & n.15 (1968). In Colorado, home rule cities have always exercised regulatory control over local cable T.V. services within their borders.[17] In all these years Colorado has never attempted to regulate cable T.V. at the state level.

At the national level, the Federal Communications Commission ("FCC") has encouraged municipal regulation of the local incidents of cable T.V.:

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[16] The court of appeals relied on the Colorado Supreme Court's decision in Manor Vail Condominium Ass'n v. Town of Vail, ___ Colo. ___, 604 P.2d 1168 (1980), holding that Vail's regulation of cable T.V. rates was "rationally related to a legitimate state interest" and did not violate the equal protection clause. *Id.* at 1171. The local government involved in *Manor Vail* was a home rule city; the police power involved was that derived solely from the City's home rule authority; and, the exercise of the police power there was fixing prices for the local cable T.V. system. Interestingly, the cable T.V. operator in *Manor Vail* was a wholly-owned subsidiary of TCI and argued that the city's price fixing ordinance "represents the legitimate and valid exercise by the town of its power to grant a franchise to [TCI]" and that fixing rates for cable T.V. is a reasonable "home-rule" regulation because cable T.V. is "a private business affected with the public interest." *See Manor Vail,* Answer of Community Television Investment, Inc. 3-4.

[17] Boulder began such regulation in 1964. The Town of Vail established cable T.V. rate schedules as early as 1968. *See Manor Vail, supra* n.16, 604 P.2d at 1170. The City of Greeley began regulating cable T.V. in 1968. (P. Br. Appendix BA-3). We understand that the brief, *amicus curiae,* of the Colorado Municipal League indicates that 85 Colorado municipalities presently regulate cable T.V. operations within their borders, several since the early 1960's.

> [L]ocal governments are inescapably involved in the process because cable makes use of streets and ways and because *local authorities are able to bring a special expertness* to such matters, for example, as how best to parcel large urban areas into cable districts.

37 Fed. Reg. 3252, 3276 (1972) (emphasis added). The FCC has concluded that franchising terms, operator qualifications, subscriber rates, districting and similar topics represented matters which are "*uniquely within the competence of local authorities.*" *Id.* (emphasis added).[18]

The Colorado Constitution itself states that, as to local matters, home rule city ordinances "shall supersede within the territorial limits . . . of said city . . . any law of the State in conflict therewith." COLO. CONST. art. XX, § 6. Thus, for example, a home rule city's zoning ordinance "aimed at establishing low-cost housing in a specific area within the city" is a local matter, subject only to the city's self-governing power:

> Any alleged conflict, then, between the ordinance in question and the provisions . . . of the Colorado statutes, as to which controls, is resolved in favor of the local ordinance.

Moore v. *City of Boulder,* 29 Colo. App. 248, 254, 484 P.2d 134, 137 (1971); *City of Colorado Springs* v. *Smartt,* ___ Colo. ___, 620 P.2d 1060, 1062 (1981).

> The General Assembly has power to legislate zoning regulations applicable to *statutory cities.* Where, however, the charter of a *home rule city* exercises the power delegated to it by Article XX, Section 6 [of the Colorado Constitution], as to matters of purely local concern, the legislature has no power.

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[18] *See also* 39 Fed. Reg. 14288, 14292 (1974). We understand that the brief, *amicus curiae,* filed by the Cable Television Information Center will also address the local nature of cable T.V.

Service Oil Co. v. *Rhodus,* 179 Colo. 335, 346, 500 P.2d 807, 812 (1972) (emphasis in original); *see Klemme* at 326. Like zoning and other local matters, the issuance of permits for cable T.V. services in a City's right-of-way affects peculiarly local interests.

Colorado's constitutional home rule system may well provide the broadest and strongest grant of self-government of all the 50 states. *Klemme* at 359-61. It has long been viewed as having "no counterpart in the constitutions of other states." *City and County of Denver* v. *Henry,* 95 Colo. 582, 586, 38 P.2d 895, 897 (1934).[19] In the instant action, the trial court characterized Colorado home rule as "rather unique". (March 6 Tr. 123).[20] The court of appeals also cautioned that "[i]t is a mistake to generalize about 'home rule' as it may be treated in opinions from different jurisdictions" (App. Pet. A-4) and relied upon the nature of Boulder's home rule powers in reaching its decision. (App. Pet. A-5 to A-6).

Whether unique or just unusual, Colorado's constitutional guarantee of home rule to Boulder clearly frames

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[19] Colorado's home rule provision is unique because of its source — the people of Colorado acting through the State Constitution — and its scope — authority to supersede the state legislature as to local matters. A detailed discussion of the differences among the home rule authorities of the various states is set forth in Respondent's Brief in Opposition to the petition at 24-25.

[20] THE COURT: If you get down to the ultimate source of the power, and governmental concepts, Boulder is exercising authority of the people of the state of Colorado in matters of local concern within Boulder, because the people of the state of Colorado exercising their ultimate sovereign power put Article 20 in the Constitution of this state. They are not operating under some delegated authority from the representatives in the general assembly. *They are operating on the basis of the ultimate sovereign authority of the people of the state. That's what Colorado's Article 20 is all about.*

(March 6 Tr. 125, *quoted at* App. Pet. A-5; emphasis added).

the issue before this Court: *Where the state constitution grants autonomy over local matters to a home rule city, does the City Council's valid exercise of those powers to enact an ordinance halting cable T.V. construction within the City limits for 90 days constitute an act of government which is beyond antitrust attack?*

B. Under *Parker* And *City of Lafayette*, The Home Rule City Ordinance Challenged Here Is Not Subject To Sherman Act Attack.

In *Parker* v. *Brown*, 317 U.S. 341 (1943), a California statute "restrict[ed] competition among the growers and maintain[ed] prices in the distribution of their commodities to packers." *Id.* at 346. The Court reversed an injunction of this plan, holding that:

> The state in adopting and enforcing the prorate program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but, *as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit.*

317 U.S. at 352 (citations omitted; emphasis added).

The only distinction between the present case and *Parker* is that here the "act of government" is imposed by a home rule city rather than by the state legislature.[21] Under *Parker* and Colorado law, this is a distinction with-

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[21] Petitioner and the state *amici* apparently concede that a statewide cable T.V. regulation adopted by the state legislature would be immune from antitrust attack under *Parker*. Thus, this is not a situation where the government's interest in the challenged act is so remote that even a state program would not qualify under *Parker*. *E.g.*, Cantor v. Detroit Edison Co., 428 U.S. 579 (1976). Rather, Petitioner and the *amici* states contend that the *Parker* immunity ordinarily applicable dissolves solely because the regulation of local cable construction was adopted by the City's home rule municipal legislature.

out a difference. In Colorado, "home-rule cities, such as [Boulder], are constitutionally granted every power possessed by the General Assembly as to local and municipal matters. . . ." *Veterans of Foreign Wars, Post 4264* v. *City of Steamboat Springs,* 195 Colo. 44, 50, 575, P.2d 835, 840, *appeal dismissed,* 439 U.S. 809 (1978). Indeed, as to local matters regulated by a home rule city, the Colorado General Assembly is without power to act.[22] In this situation, there can be no doubt that Boulder's home rule ordinance governing its local cable T.V. permittee constitutes "an act of government" which is not subject to the Sherman Act under *Parker.*

In *Bates* v. *State Bar of Arizona,* 433 U.S. 350 (1977), the Court held that the Arizona Supreme Court ban on attorney advertising was not subject to Sherman Act challenge:

> [T]he challenged restraint is the affirmative command of the Arizona Supreme Court under its Rules . . . That court is the ultimate body wielding the State's power over the practice of law . . . and, thus,

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[22] *Service Oil Co.* v. *Rhodus,* 179 Colo. at 346, 500 P.2d at 812. CCC's lengthy argument that home rule authority is not "exclusive" (P. Br. 28-30) is simply beside the point. The question is who has predominant authority where a state statute and a home rule city ordinance conflict over a local matter. CCC's "city-state" argument (P. Br. 25-27; A.G. Br. 27 n.35) is equally fallacious. When Colorado home rule first appeared, those who sought to avoid local regulation challenged the concept as an unrepublican form of government violative of the United States Constitution, article 4, § 4. This Court and the Colorado Supreme Court uniformly rejected the contention. City and County of Denver v. New York Trust Co., 229 U.S. 123, 141 (1913); People ex rel. Attorney General v. Curtice, 50 Colo. 503, 117 P. 357, *appeal dismissed sub nom.* Cassidy v. Colorado, 223 U.S. 707 (1911). It is solely in the context of rejecting these old "unrepublican government" claims that the Colorado courts have characterized home rule cities as not being "city-states."

> the restraint is "compelled by direction of the State acting as sovereign."

433 U.S. at 359-60 (citation omitted). So too, in the present case the City of Boulder "is the ultimate body wielding the State's power" on Boulder's local matters and, thus, "the restraint 'is compelled by direction of the State acting as sovereigr..'"

In three other cases, the Court faced attempts by private business concerns to shield their private anticompetitive conduct behind the governmental sovereignty of a state or its subdivision.[23] The present case is entirely different: here, the private business brings an antitrust action against the government itself challenging a unilaterally adopted ordinance.

The sole argument of the Petitioner (and the amici states) is that the ruling in City of Lafayette v. Louisiana Power & Light Co., *435 U.S. 389 (1978), compels this Court to reverse the decision of the court of appeals in the instant case.* As the following discussion demonstrates the decision of

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[23] In California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc., 445 U.S. 97 (1980), private price fixers were denied immunity because California's wine trade regulation "simply authorizes price-setting and enforces the prices established by private parties." *Id.* at 105. In Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975), a unanimous Court held that attorney title search fees fixed by the bar association were not immune under *Parker* since the price fixing rule "is essentially a private anticompetitive activity." *Id.* at 792. In Cantor v. Detroit Edison Co., 428 U.S. 579 (1976), the Court held that a tie-in of light bulb sales to electricity service by a private utility was not immune under *Parker* since "[n]o public officials or agencies are named as parties and there is no claim that any state action violated the antitrust laws." *Id.* at 591. In *Bates,* 433 U.S. at 361, the Court emphasized that "*Cantor* would have been an entirely different case if the claim had been directed against a public official or public agency, rather than against a private party."

the court of appeals is entirely consistent with *City of Lafayette* and satisfies the applicable tests enunciated in that decision.

In *City of Lafayette,* a city-owned and operated electric utility brought an antitrust action against its private competitor. The defendant's counterclaim alleging illegal tie-ins and other antitrust violations by the city was dismissed as immune under *Parker.* The court of appeals reversed and this Court affirmed, holding that the challenged activities of Lafayette in operating its electric utility were not immune from antitrust attack. A majority of the Court (Justices Brennan, Marshall, Powell and Stevens, with the Chief Justice concurring in part I) agreed with the Fifth Circuit's holding that *Parker* immunity would apply only if a City's actions "'are comprehended within the powers granted to it by the legislature.'" 435 U.S. at 394.

Mr. Justice Brennan's plurality opinion (Parts II and III in which Justices Marshall, Powell and Stevens joined) would go further and limit *Parker* immunity to acts which are "pursuant to state policy to displace competition with regulation or monopoly public service." 435 U.S. at 413.[24] The Chief Justice concurred in the judgment on the basis that *Parker* did not apply to municipal "business activity" which made the case "an ordinary dispute among competitors in the same market." *Id.* at 418, 419. Mr. Justice Stewart (joined by Justices White, Blackmun and Rehnquist) dissented on the basis that under *Parker,* the antitrust laws are equally inapplicable to the actions of the states or their political subdivisions. *Id.* at 426.[25]

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[24] Mr. Justice Marshall filed a brief concurrence in the plurality opinion. 435 U.S. at 417-18.

[25] Mr. Justice Blackmun filed a separate dissenting opinion registering his view that *Parker* immunity should not apply to cities "act-

Boulder's moratorium Ordinance qualifies for immunity under the tests set forth in City of Lafayette *by the majority, the plurality, the Chief Justice's concurrence, and the dissent.* Here the action complained of (a local construction moratorium) is plainly within the authority given the home rule City of Boulder, is contemplated by its constitutional grant of powers directly from the people and thus meets the majority's test.

Similarly, although the plurality reasoned that a city's actions would qualify under *Parker* only if they were taken "pursuant to a state policy to displace competition with regulation," 435 U.S. at 413, the plurality further emphasized that:

> *This does not mean, however, that a political subdivision necessarily must be able to point to a specific, detailed legislative authorization before it properly may assert a Parker defense to an antitrust suit.* . . . [W]e agree with the [Fifth Circuit] Court of Appeals that an adequate state mandate for anticompetitive activities of cities . . . exists when it is found "from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of."

Id. at 415 (emphasis added; citation omitted). Thus, "it is not necessary to point to an express statutory mandate for each act"; it is sufficient if the municipal acts "are comprehended within the powers granted to it by the legislature." *Id.* at 393-94. No talismanic legislative words are required and the "'district judge's inquiry on this point should be broad enough to include all evidence which might show the scope of legislative intent.'" *Id.* at 394.

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ing in concert with private parties" and questioning the appropriateness of the treble damages remedy when cities are defendants. 435 U.S. at 441-43.

Boulder's Ordinance is fully consistent with the *City of Lafayette* plurality test.[26] Here the requisite state policy is derived from the Colorado Constitution's grant to Boulder of home rule power over matters of local concern.

The exercise of such powers of home rule is neither new to our system of government nor unanticipated by this Court. In applying the one man, one vote principle to local government, for example, the Court pointed out that:

> While state legislatures exercise extensive power over their constituents and over the various units of local government, the States universally leave much policy and decisionmaking to their governmental subdivisions. Legislators enact many laws but do not attempt to reach those countless matters of local concern necessarily left wholly or partly to those who govern at the local level. What is more, in providing for the governments of their cities, counties, towns, and districts, *the States characteristically provide for representative government — for decisionmaking at the local level by representatives elected by the people. And, not infrequently, the delegation of power to local units is contained in constitutional provisions for local home rule which are immune from legislative interference.*

Avery v. *Midland County*, 390 U.S. 474, 481 (1968) (emphasis added); *see also, District of Columbia* v. *John R. Thompson Co., Inc.*, 346 U.S. 100, 108-09 (1953).

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[26] The Third and Fifth Circuits have held that express state authorization is unnecessary since the authority for the actions of a state instrumentality "'may be inferred from the nature of the powers and duties given to a particular government entity.'" Feminist Women's Health Center, Inc. v. Mohammad, 586 F.2d 530, 550 (5th Cir. 1978), *cert. denied*, 444 U.S. 924 (1979); Princeton Community Phone Book, Inc. v. Bate, 582 F.2d 706, 717 (3d Cir.), *cert. denied*, 439 U.S. 966 (1978).

The vitality of this home rule theory of government lies in its underlying premise that — to paraphrase the plurality in *City of Lafayette* — the locally autonomous, representative government does not need "to point to a specific, detailed legislative authorization." 435 U.S. at 415. Indeed, such specific and detailed legislative directives are inherently inconsistent with the theory of home rule. Thus, under the test of the *City of Lafayette* plurality, it is enough that Boulder's cable T.V. moratorium Ordinance is "comprehended" or "contemplated" by the powers and authorities which the Colorado Constitution confers upon it.

Moreover, the grant of legislative authority over local matters necessarily contemplates that legislative regulations may restrain trade to accomplish legitimate regulatory goals. See discussion *infra* at 34-35. The principle is amply demonstrated by the General Assembly which, like the City of Boulder, is endowed with legislative powers by the state constitution. COLO. CONST. art. V, § 1. However, nowhere does the constitution specify that in exercising legislative powers, the General Assembly may restrain trade. Yet it is beyond challenge that the General Assembly's regulatory statutes are immune from antitrust attack. "[I]f an adverse effect on competition were, in and of itself, enough to render a state statute invalid, the States' power to engage in economic regulation would be effectively destroyed." *Exxon Corp.* v. *Governor of Maryland,* 437 U.S. 117, 133 (1978). The contemplation of this kind of *legislative anticompetitive act* is inherent in the grant of the legislative authority — whether to the General Assembly over state matters or to the home rule City Council over local matters.[27]

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[27] For example, the General Assembly has strictly regulated the market for child labor through a variety of statutory minimum ages and corresponding lawful jobs for minors. COLO. REV. STAT. §§ 8-12-

The Chief Justice's concurring opinion in *City of Lafayette* makes clear that he declined to apply *Parker* because the cities there were " 'engaging in what is clearly a business activity' " (435 U.S. at 418) which presented "an ordinary dispute among competitors in the same market." *Id.* at 419. The Chief Justice reasoned that although a city's governmental acts are not reachable under the antitrust laws, the ordinary commercial activities of its "entrepreneurial personality" (*id.* at 422) are subject to antitrust scrutiny unless compelled by the state. Since the Ordinance challenged here was a legislative enactment within the City's home rule powers, rather than the operation of a business enterprise, Boulder's Ordinance would apparently satisfy the Chief Justice's test.

In any event, the court of appeals properly distinguished the present case from *City of Lafayette* on the basis of important factual differences. Even the plurality opinion focused on the potential impact of cities' "economic choices," made "in the conduct of their *business affairs,*" as a "*business enterprise*" and "*acting as providers of services.*" *Id.* at 403, 408 (emphasis added). Unlike Lafayette, Boulder was not acting as an "owner or provider of services" (*id.* at 408), Boulder's dispute with CCC is not simply "one among competitors in the same market" (*id.* at 419) and Boulder was not engaged in its own "business enterprise" (*id.* at 408).[28] The court of ap-

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101 to 8-12-117 (1973). Yet, there is no express constitutional directive authorizing this "specific *kind* of action in a *particular* area." (P. Br. 35).

[28] The Tenth Circuit characterized the Louisiana cities' actions as "proprietary" to distinguish them from Boulder's governmental acts. (App. Pet. A-6 and A-7). This distinction is used by the Chief Justice in his concurring opinion in *City of Lafayette:* "I use the term

peals properly found that "[t]he City is not in the television business in any way" (App. Pet. A-6 to A-7) and that, accordingly, *City of Lafayette* was distinguishable from Boulder's situation. (App. Pet. A-8).

More important, however, than the differences in the kind of municipal actions at issue is the fact that Petitioner's demand for specific, detailed statutory authorization in each case would be particularly unworkable in the context of Colorado home rule because it is based on two false premises.

First, the Petitioner's rule would rely exclusively on the state legislature as the sole policymaker in the state. Whatever relevance this approach may have in other contexts, it has no relevance in the case of Colorado home rule cities where the state constitution guarantees local autonomy. *How can the state legislature's "contemplation" be determinative when the authority for the challenged ordinance did not originate with the legislature's grant, but with an amendment to the state constitution adopted by referendum? How can the state legislature's "contemplation" be determinative when the constitution expressly prohibits the*

'proprietary' only to focus attention on the fact that all of the parties are in a competitive relationship. . . ." 435 U.S. at 422 n.3. Petitioner's hornbook and state law definitions (P. Br. 36 n.21) drawn from other contexts are irrelevant; as used by the Tenth Circuit the term has reference to a municipality's business activities in competition with private enterprises. Moreover, the mere payment of a 2% fee to the City (J.A. 7) does not make the City's action proprietary. *See* Parker v. Brown, 317 U.S. at 348 (where raisin growers paid $2.50 per ton to the state). Furthermore, none of the challenged City actions alter or affect this 17 year old fee arrangement. (See Ordinance No. 4515 at 3; this part of the ordinance was omitted from the copy of the ordinance reprinted in the J.A. by petitioner; see appendix to this brief at 1a).

state legislature from overriding the will of the local people "in both local and municipal matters?"

Second, the proposed rule is premised on the notion that government at the state level establishes "state direction" and "an actual *state* decision" in each case. (P. Br. 34-35; A.G. Br. 21). Here again, whatever relevance this approach may have in other contexts, it has none in the case of Colorado home rule cities where the "direction" and the "decision" on local matters arises at the local level pursuant to "the full right of self-government."

It is simply not enough to say that all cities need do is abide by the antitrust laws. The mere need to defend one's self when charged with violating the antitrust laws, with the unavoidable costs in time and money, may be too burdensome for financially strapped cities to undertake. Moreover, given established Sherman Act law, many legitimate governmental activities could be deemed to be anticompetitive. (*See* discussion *infra* at 34-35). Thus, the application of *City of Lafayette* to require a specific state directive in each case would foreclose home rule cities from acting on local matters without going back to the General Assembly for an express direction on each particular matter.

The difference of opinion on this point between the *amici* states and the self-governing cities such as Boulder is not new. At stake is the same governmental power over local matters which in 1902 the people of Colorado wrested from the state legislature and firmly granted to local, home rule governments by constitutional amendment. Nor is the talk (P. Br. 44-45; A.G. Br. 29) of elevating the "parochial interests" of home rule cities over the state legislature new. What the Colorado Attorney General seeks to do here is to reclaim in federal court — under the guise of the antitrust laws — a degree of the

General Assembly's power over home rule affairs which it lost in the political process by constitutional referendum eighty years ago.

II. TO THE EXTENT *CITY OF LAFAYETTE* MAY BE CONSTRUED AS SUBJECTING BOULDER'S HOME RULE ORDINANCE TO ANTITRUST ATTACK, IT SHOULD BE CLARIFIED IN KEEPING WITH THE PURPOSE OF THE SHERMAN ACT AND COUNTERVAILING PRINCIPLES OF FEDERALISM.

The decision in *City of Lafayette* is the only instance in which this Court has held that unilateral actions of a government could subject the government itself to liability under the Sherman Act. To the extent *City of Lafayette* may be interpreted, as Petitioner here urges (P. Br. 35), as subjecting all municipal ordinances to antitrust scrutiny absent an explicit state legislative mandate, it must be clarified so as to obviate the need for such particularized authorization in the case of Colorado home rule cities. The test on which Petitioner and the state *amici* rely is inconsistent with the plain legislative intent of the Sherman Act and with longstanding principles of Federalism.

A. The Sherman Act Was Not Intended To Apply To Legislative Acts Of Local Governments And Its Application To Such Acts Will Have Serious Adverse Consequences For Cities And For The Federal Courts.

The legislative history of the Sherman Act and the decisions of this Court demonstrate that Congress did not intend to bring *acts of government* under federal antitrust scrutiny. Moreover, antitrust scrutiny of governmental acts, particularly in the area of cable T.V., will unnecessarily handicap legitimate governmental regulation, generate bad antitrust law, and clog the federal courts.

The Sherman Act was adopted by Congress on July 2, 1890, in response to the public demand to curb "these great trusts, these great corporations, these large moneyed institutions," 21 CONG. REC. 2562 (1890) (remarks of Sen. Teller), which had steadily increased their control over prices and competition in the markets for many vital commodities and services.[29] The legislative history of the Sherman Act demonstrates clearly that the Act was directed at abuses of private business and private capital. *E.g.*, 21 CONG. REC. 2457, 2459, 2460, 2569 (1890) (remarks of Sen. Sherman); *id.* at 2647 (remarks of Sen. Vance); *id.* at 2726 (remarks of Sen. Edmunds); *id.* at 3147 (remarks of Sen. George). Congress was concerned with a problem of immense scope: the vesting of control over "the production, transportation, and sale of . . . the necessaries of life" in a few individuals and private corporations. *Id.* at 2457. It was reported to the House that the bill's "*only objective was the control of trusts. . . .*" 21 CONG. REC. 5950 (1890) (emphasis added).

Nowhere in the extensive debates is there a hint that anyone in the 51st Congress even considered the possibility, much less intended, that the legislation be-

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[29] Senator James K. Jones of Arkansas voiced a common sentiment and concern:

> The growth of these commercial monsters called trusts in the last few years has become appalling. For a long while they were limited in numbers and applied to but a few articles. . . .
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> Now, however, having been allowed to grow and fatten upon the public, their success is an example of evil that has excited the greed and conscienceless rapacity of commercial sharks until in schools they are to be found now in every branch of trade, preying upon every industry, and by their unholy combinations robbing their victims, the general public, in defiance of every principle of law or morals.

20 CONG. REC. 1457 (1889). *See also* H. THORELLI, THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION 72-96 (1955).

fore them would be used to effect federal regulation of legitimate local governmental actions. Nor has any subsequent Congress, in the passage or consideration of antitrust legislation, indicated an intent to apply the Sherman Act to governmental acts of a state or its subdivisions.[30]

In keeping with the Sherman Act's plain purpose, this Court has interpreted the Act as a remedy for the abuses of *private businesses* and not as subjecting governmental activities to the antitrust laws. From its earliest antitrust decisions, the Court viewed the Act as directed at private business combinations.

> [The debates on the Sherman Act] conclusively show . . . that the main cause which led to the legislation was the thought that it was required by the economic condition of the times; that is, the vast accumulation of wealth in the hands of corporations and individuals. . . .

Standard Oil Co. v. *United States,* 221 U.S. 1, 50 (1911); *see also Northern Securities Co.* v. *United States,* 193 U.S. 197, 352 (1904) ("interests of private persons and corporations cannot be made paramount to the interests of the general public"); *Apex Hosiery Co.* v. *Leader,* 310 U.S. 469, 493 (1940) (antitrust laws concerned with restraints "in business and commercial transactions"); *Texas Industries, Inc.* v. *Radcliffe Materials, Inc.,* 49 U.S.L.W. 4537, 4541 (U.S. May 26, 1981) ("treble-damages action remains a private suit involving the rights and obligations of private parties").

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[30] *See* H. THORELLI, *supra* n.29, at 500-56; HOUSE SELECT COMM. ON SMALL BUSINESS, 89th Cong., 2d Sess., CONGRESS AND THE MONOPOLY PROBLEM 153-434 (Comm. Print 1966) (reviewing all antitrust-related legislation between 1890 and 1966).

Early in the Sherman Act's history the Court rejected a claim that a state's practice of licensing harbor pilots, through its authorized state agents, violated the Sherman Act, holding that the argument:

> . . . is also but *a denial of the authority of the state to regulate,* since, if the state has the power to regulate, and in so doing to appoint and commission those who are to perform pilotage services, it must follow that *no monopoly or combination in a legal sense can arise from the fact that the duly authorized agents of the state are alone allowed to perform the duties devolving upon them by law.*

Olsen v. *Smith,* 195 U.S. 332, 345 (1904) (emphasis added).

In *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.,* 365 U.S. 127 (1961), the Court held that private efforts to induce a state legislature to take anticompetitive acts were beyond antitrust attack. *Id.* at 139. A contrary ruling, the Court reasoned, would deny the government access to public comment, thus imputing to the Sherman Act "a purpose to regulate, not business activity, but political activity, *a purpose which would have no basis whatever in the legislative history of that Act.*" *Id.* at 137 (emphasis added). Cutting government off from the people would "substantially impair the power of government to take actions through its legislature and executive that *operate to restrain trade.*" *Id.* (emphasis added).

This Court and other federal courts have applied the *Noerr* doctrine with equal force to petitions directed to state agencies and local governmental bodies. *E.g., California Motor Transport Co.* v. *Trucking Unlimited,* 404 U.S. 508, 510-11 (1972) (state agencies); *Mark Aero, Inc.* v. *Trans World Airlines, Inc.,* 580 F.2d 288, 296 (8th Cir. 1978) (city councils); *In re Airport Car Rental Litigation,*

1981-1 TRADE REG. REP. (CCH) ¶ 63,983 (N.D. Cal. 1981) (city airport authorities).

In *Noerr*, the Court recognized that government must have access to public opinion in order to function responsibly. If the private petitioner urging anticompetitive action is shielded from the antitrust laws, must not the local government, in performing its legislative function, also be protected from the rigors of antitrust litigation and potential treble damages? *Otherwise, government will cease to listen to its constituents for fear of the cost of being responsive.*

Subjecting local governments to the antitrust laws would also present substantive antitrust problems. In *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 691-92 (1978), the Court held that "[T]he inquiry mandated by the Rule of Reason is whether the challenged agreement is one that promotes competition or one that suppresses competition . . .; it is not to decide whether a policy favoring competition is in the public interest. . . ." The Rule thus requires a weighing of competitive effects and *a disregard of governmental policy objectives* which cannot be measured on the Rule's competitive scale.

Governments as a whole, and local governments in particular, often pursue governmental policy objectives which are unrelated to promoting competition and thus cannot be balanced under the Rule of Reason.[31] The child labor laws certainly restrain trade and do little to promote competition for child laborers. Similarly, restrictions on

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[31] The instant case is one of the rare instances in which a local government's actions would be judged reasonable under the Rule of Reason. Boulder's principal motivation in adopting the moratorium Ordinance, *supra* at 5, was procompetitive. The moratorium effected only a "temporary and limited loss of competition," outweighed in a proper Rule of Reason analysis by the prospective long term benefit

the hours during which taverns may serve liquor plainly restrain trade and do not promote competition in the liquor sales market. Likewise, health, safety, fire, environmental and other forms of local governmental regulation may impose very significant trade restraints in furtherance of legitimate social objectives which have nothing whatever to do with stimulating competition. Examples of such matters covered by municipal regulations are the fixing of prices for monopoly cable T.V. services[32]; land use planning pursuant to zoning ordinances[33]; limitations on hours of operations of business[34]; refuse disposal and other environmental controls[35]; and low-cost housing.[36]

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of opening a market controlled by a *de facto* monopolist. *National Society of Professional Engineers*, 435 U.S. at 689 & n.12. Moreover, the trial court's finding of a "conspiracy" on the basis of a faulty analogy to Sahm v. V-1 Oil Co., 402 F.2d 69 (10th Cir. 1968) and like cases was an error of law. The analogy is inapplicable here because (1) there is no underlying illegal contract, (2) the challenged activity was not an attempt to enforce such a contract, and (3) CCC never complied with the moratorium. The court of appeals could have reversed on the basis of these errors of law alone. Its decision to reach the "jurisdictional" question of whether the Sherman Act applied to Boulder is a recognition of the importance of the issue and of the judicial resources conserved by avoiding lengthy Rule of Reason trials.

[32] *E.g., Manor Vail, supra* at 17 n.16, 604 P.2d at 1171-72.

[33] *E.g.*, BOULDER, COLO., CODE §§ 37-101 through -1211 (1965 rev. ed.).

[34] *E.g.*, BOULDER, COLO., CODE § 3-210 (1965 rev. ed.) (limitation on hours of operation for taverns).

[35] Glenwillow Landfill, Inc. v. City of Akron, 485 F. Supp. 671 (N.D. Ohio 1979), *appeal docketed sub nom.* Hybud Equip. Corp. v. City of Akron, No. 80-3121 (6th Cir. Jan. 14, 1980).

[36] *See* Strauss & Stegman, *Moderate-Cost Housing After* Lafayette: *A Proposal*, 11 URB. LAW. 209 (1979) (municipal regulations to control resale price of homes for low-income housing projects).

These types of local regulation have three things in common. First, they unquestionably serve legitimate governmental interests in matters of local concern.[37] Second, at least in Colorado, there is no specific state statutory mandate under which home rule cities could enact many of these regulations and thus qualify for immunity under the *City of Lafayette* test proposed by Petitioner and the *amici* states. Third, many of these municipal restrictions are incorporated into permits, franchises and licenses which a trial court might determine constitute a "contract, combination . . . or conspiracy in restraint of trade."

As a result, the reversal of the court of appeals' ruling in this case would:

1. *Turn every unhappy or unsuccessful applicant for a municipal permit, franchise or license into an antitrust plaintiff with full access to the federal courts, to extensive pre-trial discovery, and to a jury trial.* Considering the fact that each local government issues and denies thousands of these permits, franchises, and licenses each year, and that there are roughly "40,000 local government units nationwide" (A.G. Br. 8), this development alone could clog the federal courts for years.[38]

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[37] It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.

Berman v. Parker, 348 U.S. 26, 32-33 (1954), *quoted in* Village of Belle Terre v. Boraas, 416 U.S. 1, 6 (1974).

[38] In a speech made by a deputy assistant attorney general from the Antitrust Division, municipal officials were warned that a "non-exhaustive" list of areas of municipal activity which might be open to antitrust challenges included: (1) any regulatory activity, including occupational licensing and regulation; (2) the operation of sports arenas or convention centers; (3) the provision of water, electric, and other utility services; (4) garbage collection; (5) transit systems, including taxis; (6) public health

2. *Force federal courts who strictly apply the Sherman Act to enjoin legitimate local governmental regulation.* Many local governmental actions will serve legitimate, but anticompetitive, public interests which are not cognizable under the Rule of Reason. Similarly, at least in the context of home rule cities, many such actions will be unsupported by any specific state legislative mandate. Thus, in a strict application of the antitrust laws, the federal courts will be required to enjoin admittedly desirable local regulation.[39]

3. *Force federal courts who are unwilling strictly to apply the Sherman Act to create new and unsound antitrust "rubrics" in order to avoid the necessity of enjoining desirable local regulation.*[40]

4. *Subject local governments — which are ill equipped to handle complex antitrust litigation — to very substantial litigation costs for their own defense.* Even

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services; (7) airports; (8) parking lots; (9) procurement practices generally; and (10) zoning. Remarks of Joe Simms, 72d Annual Conference of Municipal Finance Officers Association (May 15, 1978).

Note, *The Application of Antitrust Laws to Municipal Activities*, 79 COLUM. L. REV. 518, 524 n.54 (1979).

[39] Moreover, subjecting cities to judicial antitrust review would effectively turn back the clock to the era of substantive due process, when every legislative act of government was subjected to endless economic "hair-splitting" by the federal courts. *See* Verkuil, *State Action, Due Process and Antitrust: Reflections on* Parker v. Brown, 75 COLUM. L. REV. 328 (1975); Handler, *Twenty-Fourth Annual Antitrust Review*, 72 COLUM. L. REV. 1, 4-18 (1972).

[40] Consider the myriad exceptions and refinements that the lower courts developed in order to avoid application of the rule of *per se* illegality for vertical non-price restraints between the time the rule was set forth in United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967), and then rescinded in Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977). *See id.* at 48 n.14; Posner, *The Rule of Reason and the Economic Approach: Reflections on the* Sylvania *Decision*, 45 U. CHI. L. REV. 1, 3 n.10 (1977).

> specious claims will be difficult to avoid litigating, since "summary procedures should be used sparingly" in antitrust cases.[41] Of course, losing a case would also subject a city — and its taxpayers — to the additional liability for the plaintiff's attorneys' fees and potentially enormous treble damages.

The impact of such a ruling in the field of cable T.V. alone would be significant. Because of the high stakes involved in the current "boom" in franchising of cable markets, the effort of a disappointed applicant in seeking injunctive relief or damages under the antitrust laws is quite worthwhile, even if it serves merely as a bargaining tool. Is every city that issues a cable permit to be required to face such antitrust litigation from the rejected suitors? Is every city that granted a cable permit 15 or 20 years ago, as Boulder did, to be saddled with the same monopoly operator and the same permit because legitimate governmental acts to modify the permit are subject to Sherman Act attack?[42]

The Petitioner and the *amici* states argue that the application of *Parker* to Boulder's cable T.V. Ordinance will shatter "'our national economic policy'" (A.G. Br. 2, 11, 29) and overturn our "free market goals" (P. Br. 20,

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[41] Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473 (1962).

[42] Remedies for economic displacement caused by governmental acts should be found, if at all, in a source other than the Sherman Act. For example, unauthorized actions by municipal governments or their agents may be attacked as *ultra vires*. 17 E. McQUILLIN, MUNICIPAL CORPORATIONS §§ 49.18, 49.29 (3d ed. 1979). Criminal actions may, of course, be prosecuted under state (COLO. REV. STAT. § 18-5-401 (1973)) and federal (18 U.S.C. § 1341 (1976) (mail fraud); 18 U.S.C. § 1962 (1976) (RICO)) criminal laws. *See, e.g.*, United States v. Mandel, 602 F.2d 653 (4th Cir. 1979), *cert. denied*, 445 U.S. 961 (1980).

43-44) by elevating "parochial interests at the expense of wider concerns." (P. Br. 20, 44-45; A.G. Br. 2, 11, 29). These broad claims are in error on a number of grounds. The free market concept has always countenanced an important role for governmental action. Adam Smith himself affirmed the role of government in maintaining public works and regulating certain monopolistic businesses. 2 A. SMITH, THE WEALTH OF NATIONS 184-85, 214-49 (1904). Moreover, as the foregoing discussion demonstrates, much necessary and desirable municipal action simply cannot pass the relevant Sherman Act tests. In the ninety years since the Sherman Act was adopted it was never thought to apply to cities' legislative acts. Surely our "free market goals" will not be destroyed if the legislative acts of home rule cities remain insulated by *Parker.*

It is ironic that the states would raise this argument since they would be the first to insist upon the right to elevate their 50 individual interests "to a position of preeminence over the national economic policy favoring competition which is embodied in the antitrust laws." (A.G. Br. 29). In addition, if a state legislature believes that exempting home rule cities from the Sherman Act would disrupt some state-wide policy (A.G. Br. 11), its remedy is in the political forum. The Constitution of Colorado can be amended by referendum, as the people did in 1902.

B. The Principles Of Federalism As Embodied In The United States Constitution And In The Decisions Of This Court Preclude The Application Of The Sherman Act To The City Ordinance Challenged Here.

Significant Federalism concerns arise when a federal statute under the commerce clause is applied so as to interfere with the most fundamental attribute of state

sovereignty — the authority of the state to determine the structure of its own government. The history of the Constitution shows that the Framers intended our "dual system of government" to ensure the continued existence of an enclave in which local, representative democracy could function. Moreover, this Court has expressly recognized that there are Federalism limits to Congressional commerce clause power to regulate matters which affect the integral functions of state and municipal governments.

The freedom of the state to allocate power and determine its governmental structure is one of the undisputed "*attributes of sovereignty*" protected by Federalism.[43] The first organic act of a sovereign government is to organize its decisionmaking apparatus; if the government cannot determine who may exercise the power and in what manner, it has no sovereignty. This Court has always recognized the state's right to allocate its sovereign power among its various subdivisions.[44] Thus, Colorado's con-

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[43] "Whether territory shall be governed for local purposes by a county, a city or a township organization is one of the most usual and ordinary objects of state legislation." Kelly v. City of Pittsburgh, 104 U.S. 78, 81 (1881).

[44] In Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60 (1978), for example, the Court declined to overturn an Alabama statute subjecting citizens of an unincorporated association to the police and sanitary regulations of an adjoining city. "[A] State is afforded wide leeway when experimenting with the appropriate allocation of state legislative power." *Id.* at 71. Similarly, in Sailors v. Board of Education, 387 U.S. 105 (1967), the Court accorded deference to a state decision to appoint rather than elect the members of a county school board. In so ruling, the Court reiterated the principle that "[s]ave and unless the state, county and municipal government runs afoul of a federally protected right, it has vast leeway in the management of its internal affairs." *Id.* at 110; *see also* Lockport v. Citizens for Community Action, 430 U.S. 259 (1977); Hunter v. City of Pittsburgh, 207 U.S. 161 (1907); Williams v. Eggleston, 170 U.S. 304 (1898); Kelly v. City of Pittsburgh, 104 U.S. 78 (1881).

stitutional choice to allocate legislative power over local matters to home rule cities is entitled to deference.

Moreover, local governments have always been an integral part of the American political system. In the years prior to the American Revolution, local governments allowed the colonists to engage in self-rule without interference from England:

> The preponderance of political power was exercised in towns, parishes, counties, and boroughs, and . . . these entities were even more independent of the colony than the colony was of the Crown. Self-government was doubly the rule in colonial America.[45]

Following the Revolution and the adoption of the Constitution, it remained clear that the Framers intended local governments to share in the sovereignty reserved to the states. As Madison stated the point:

> Was, then, the American Revolution effected, was the American Confederacy formed, was the precious blood of thousands spilt, and hard-earned substance of millions lavished, not that the people of America should enjoy peace, liberty, and safety, but that the governments of the individual States, *that particular municipal establishments, might enjoy a certain extent of power and be arrayed with certain dignities and attributes of sovereignty?*

THE FEDERALIST No. 45 at 289 (Mentor ed. 1961). These principles of Federalism were embodied in the system

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[45] C. ROSSITER, SEEDTIME OF THE REPUBLIC at 16 (1953).

> [L]ocal governments throughout the colonies operated with substantial economy and popular control. . . . [T]hese governments served as excellent training grounds for self-government, particularly in New England, where the town meeting . . . prevailed.

POLITICS AND GOVERNMENT IN THE UNITED STATES 49 (A. Westin ed. 1965); *see also* C. BRIDENBAUGH, CITIES IN REVOLT: URBAN LIFE IN AMERICA, 1743-1777 (1955).

established by the Constitution and were codified in the tenth amendment. II J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1907 (3d ed. 1858).

In the 1800's de Tocqueville found New England towns exercising broad local autonomy. See discussion *supra* at 12. And, municipal governments continued to exercise the "attributes of sovereignty" of which Madison spoke in dealing with uniquely local, urban problems such as "[l]ighting, fire protection, the care of the streets, crime prevention, sewage disposal, water, community health [and] marketing facilities."[46]

Furthermore, throughout its review of municipal legislation, the Court has recognized that the principles of Federalism require deference to local as well as state governmental action. In determining whether federal statutes under the commerce clause preempted a conflicting city ordinance, for example, the Court has given municipal acts and state acts equal deference. *See Huron Portland Cement Co.* v. *City of Detroit,* 362 U.S. 440 (1960) (federal ship licensing statute did not preempt City of Detroit smoke abatement ordinance). The Court has also treated cities and states equally for a variety of other purposes.[47]

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[46] A. Schlesinger, *A Panoramic View,* in THE CITY IN AMERICAN LIFE 17 (P. Kramer ed. 1970).

[47] City of New Orleans v. Dukes, 427 U.S. 297, 301 (1976) ("A municipal ordinance is a 'state statute' for purposes of [the Court's jurisdiction]"); Sup. Ct. R. 36.4 (treats states and their political subdivisions equally for purposes of filing briefs *amicus curiae*); Waller v. Florida, 397 U.S. 387, 391 (1970) (double jeopardy clause); Avery v. Midland County, 390 U.S. 474, 480 (1968) (state action under the fourteenth amendment); City of Trenton v. New Jersey, 262 U.S. 182 (1923) (impairment of contract clause).

These same principles have recently been applied to bar federal commerce clause encroachment on legitimate city functions. In *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), the Court held that, to the extent federal wage and hour laws adopted under the commerce clause operate to displace the freedom of cities and states "to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by Art. I, § 8, cl. 3." *Id.* at 852 (footnote omitted). The Court's decision was grounded in the principles which underlie "our federal system of government" (*id.* at 842, 844, 852). Moreover, the Court eschewed the notion that Federalism's "dual system" gave deference to states only and not to their political subdivisions, pointing out that:

> As the denomination "political subdivision" implies, the local government units which Congress sought to bring within the Act derive their authority and power from their respective States. Interference with integral governmental services provided by such subordinate arms of a state government is therefore beyond the reach of congressional power under the Commerce Clause *just as if such services were provided by the State itself.*

Id. at 855 n.20 (emphasis added).

Thus, *National League of Cities* stands for two propositions relevant to the instant case: First, it rekindled an awareness that the principles of Federalism may, in the appropriate case, limit the reach of federal statutes under the commerce clause. Second, it recognized that these principles accord a measure of deference to cities as well as states.[48]

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[48] In Hodel v. Virginia Surface Mining & Recl. Ass'n, No. 79-1538, slip op. at 19-22 (U.S. June 15, 1981), the Court clarified the prerequisites for application of *National League of Cities* principles:

> First, there must be a showing that the challenged statute regulates the "States as States." Second, the federal regulation must

In *National League of Cities,* federal wage and hour regulations as applied to cities were deemed to come so close to the essential "freedom to structure integral operations" of local governments, that they touched the limit of Congressional authority under the principles of Federalism. In the present case, the application of the Sherman Act to Boulder's cable T.V. Ordinance presents the opportunity for similar encroachment in two respects.[49]

First, were the Court to interpret the Sherman Act as applying to Boulder's Ordinance because the state legislature issued no explicit mandate for the particular challenged act, the Sherman Act would intrude on the state's "freedom to structure integral operations." Any antitrust rule which forced the City to abandon its traditional local autonomy in order to obtain the specific authorization of the state legislature would interfere with the Colorado Constitution's allocation of legislative authority over local matters to home rule cities.

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address matters that are indisputably "attributes of state sovereignty." And third, it must be apparent that the States' compliance with the federal law would directly impair their ability "to structure integral operations in areas of traditional functions."

Slip op. at 21 (footnote and citations omitted). Based on this analysis, Boulder's ordinance should not be subject to federal antitrust law because the "challenged statute" — the Sherman Act — (1) directly regulates the governmental body, (2) in the exercise of a central "attribute of sovereignty" — the performance of its legislative powers, and (3) on a matter (permits for commercial use of the public right-of-way) which plainly qualifies as an integral operation in an area of traditional functions.

[49] In *City of Lafayette,* opinions in which five members of the Court joined expressly referred to *National League of Cities* as demonstrating a potential constitutional limitation on the reach of the Sherman Act over local governmental functions. *See* 435 U.S. at 423-24 (Burger, C.J., concurring); *id.* at 430 (Stewart, White, Blackmun and Rehnquist, JJ., dissenting).

Second, if the Court were to conclude that the City is not shielded by *Parker,* the substantive application of the Sherman Act to Boulder's Ordinance amending its own permit raises comparable problems. The act of the local legislative authority (the City Council) in deciding to issue, deny or amend City permits is itself an integral and traditional governmental function. 9 E. McQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 26.01a (3d ed. 1979). If such activities are to be routinely scrutinized under the Sherman Act, then one of the central attributes of sovereignty which is necessary to maintain a "separate and independent existence" (*National League of Cities,* 426 U.S. at 846, 851) will be seriously eroded.

CONCLUSION

The Petitioner and the *amici* states do not object to the application of the *Parker* doctrine to shield state regulation of cable T.V. of the type at issue here; they disagree only with the application of *Parker* to such regulation by a home rule city where the state has not attempted to legislate on the subject. On Petitioner's theory, the City of Boulder cannot lawfully stop its own permittee from digging up the City's right-of-way for 90 days because Boulder's moratorium Ordinance was not expressly authorized by the state legislature.

The fact that Colorado's Constitution allocated the state's legislative power over local matters to home rule cities does not diminish the applicability of *Parker.* In *City of Lafayette* the plurality anticipated such a situation when it concluded that although the city's acts must be "authorized or directed" by the state (435 U.S. at 414, 416, 417), it is not necessary that the city "point to a specific, detailed legislative authorization before it properly may assert a *Parker* defense to an antitrust suit." (435 U.S. at 415). Colorado's constitutional grant of home rule power satisfies this test.

To the extent *City of Lafayette* may be construed as requiring a specific, detailed authorization from the state legislature for each home rule municipal act, it must be clarified to prevent that construction. Such a broad application of the antitrust laws would be inconsistent with the intent of the Sherman Act and with the principles of Federalism on which our system of government is based. For these reasons, the decision of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX

The following paragraph of Boulder City Ordinance No. 4515 (July 22, 1980) was omitted in reprinting the ordinance in the Joint Appendix:

> WHEREAS, in order to avoid any assertion that the City is acting in a proprietary capacity in undertaking what the City Council deems to be the essential governmental objective of districting the City, the City will set the franchise fee for any new cable communications company granted a permit in the City at the same level as that paid by the grantee, through the expiration of the grantee's permit in 1984; and

The paragraph should have appeared between the third and fourth paragraphs at J.A. 71.

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No. 80-1350

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OCTOBER TERM, 1980

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v.

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Respondents.

ON WRIT OF CERTIORARI TO THE TENTH CIRCUIT COURT OF APPEALS

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

I.

SUMMARY OF PETITIONER'S REPLY

In *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389 (1978), a majority of this Court rejected *per se* municipal immunity from the antitrust laws because of concerns about the effect on competition caused by giving municipalities free hand to make their own economic choices without regard to their anticompetitive effects, 435 U.S. at 408. And, speaking for four members of the Court, Justice Brennan rejected the argument that since "municipalities may exercise the sovereign power of the State, . . . any actions which municipalities take necessarily reflect state policy and must therefore fall within the Parker doctrine." *Id.* at 413. Respecting our unique system of dual sovereignty, the plurality explained that "[c]ities are not themselves sovereign; they do not receive all the federal deference of the States that create them." *Id.* at 412.

Nevertheless, Respondent and the *amici* which support it strain to find a loophole through which a specific class of antitrust defendants (home rule cities and counties) can pass to avoid compliance with the Sherman Act. Repeating the very arguments advanced by the Louisiana municipalities and adopted by Justice Stewart, Respondent asks this Court to do no less than overrule its *City of Lafayette* decision and inject "a wholly arbitrary variable into a 'fundamental national economic policy,' [citation] which strongly disfavors immunity from its scope." *Id.* at 419-20 (Burger, C.J., concurring).

Respondent argues that home rule entities, when acting on a matter of purely local concern, become the state and are thus entitled to the state action immunity recognized in *Parker* v. *Brown,* 317 U.S. 314 (1943). Respondent maintains that since Boulder's actions over "the purely local matter of cable television" cannot be countermanded by legislation enacted by the Colorado General Assembly, Boulder's cable ordinances are "state action" reflecting the State's policy to displace competition, supervised by the State (*i.e.,* Boulder) itself. It appeared that the Tenth Circuit shared this view. (*See,* P.A. A-29, Markey, C.J. dissenting).

On September 21, 1981, however, the Tenth Circuit rendered its second decision in this litigation, *Community Communications Co.* v. *City of Boulder,* No. 80-1882, attached as Appendix (Reply App.) to this brief. The district court had held that Boulder's districting ordinance violated both the antitrust laws and the First Amendment and had enjoined its enforcement. 496 F.Supp. 823 (D.Colo. 1980).

The Tenth Circuit reversed, finding that the antitrust question was controlled by its prior decision and that the First Amendment issues required a full trial on the merits. Significantly, the court stated that it had made no finding in its first opinion that cable television was a matter of *purely* local concern:

> We did not hold in *Boulder I* that cable television is a matter of *purely* local concern . There may be a significant state interest in many aspects of this communication medium. A home rule city may pass legislation regarding a "matter of 'mixed' state and local concern," provided the regulations do not conflict with legislation enacted by the state. [Citations].

Slip. Op. at 6 n.3, Reply App. at 4.

If cable television is of a mixed state and local concern as the Tenth Circuit now appears to recognize, the Colorado General Assembly may legislate on it, and to the extent they conflict, the provisions of such legislation will override cable regulations of home rule cities, including Boulder.[1] Respondent and their *amici,* therefore, are now bereft of any support (if any existed) for the contention that, in the area of cable television, home rule cities are "the ultimate bod[ies] wielding the State's power." *Bates* v. *State Bar of Arizona,* 433 U.S. 350 (1977).

Deprived of the linchpin of its position, Respondent's argument can only rest on the theory that when "there is no interaction of state and local regulation [but] only the action or exercise of authority by the City" (*Community Communications Co.* v. *City of Boulder,* P.A. A-6), *Parker* applies.

The *City of Lafayette* plurality, however, rejected this test, explaining that State silence signified—at the most—neutrality and *not* an expression of state policy permitting immunity for cities as state agencies implementing state policy. *City of Lafayette, supra,* 435 U.S. at 411.

Respondent's brief and the Tenth Circuit decision which it extols are frontal assaults on *City of Lafayette.* While Respondent attempts to harmonize municipal action taken pursuant to broad home rule authority with the standards announced in *City of Lafayette,* in reality it asks the Court to adopt a position squarely at odds with this Court's pronouncements. Simply stated, the plurality's desire to thwart anticompetitive action of local government is diametrically opposed to Respondent's desire to allow each and every home rule entity to express its own anticompetitive policy. As valiantly as Respondent may try, it cannot stretch the plurality's "contemplated" language to fit the *per se* immunity it urges for anticompetitive acts of home rule cities acting over matters of local concern.

A telling weakness in Respondent's analysis is its failure to recognize that the *City of Lafayette* Court was aware of the authority vested in home rule cities over matters of local

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[1] Respondent carefully sidesteps this point by referring only to "local" matters. Distinguishing between "purely local" and "mixed state and local" matters, however, is crucial to analyzing the present situation. Respondent's extensive discussion of home rule autonomy is not even relevant unless cable television is a matter of *purely* local concern. If it is mixed, then state legislation prevails. *Community Communications Co., supra,* No. 80-1882, fn. 3 (and cases cited therein).

concern. In fact, the very existence of this broad authority compelled the plurality to require a state mandate for local anticompetitive action rather than face a plethora of parochial economic policies enacted without regard to that "Magna Carta of free enterprise," the Sherman Act. *United States* v. *Topco Associates,* 405 U.S. 596, 610 (1972). Respondent complains that Petitioner's interpretation of the plurality opinion contravenes the rationale behind home rule. Respondent's objection, however, ignores the Supremacy Clause of the Constitution by vaulting the local policies of home rule cities over the national legislature's decision to preclude restraints on trade. *See* opinion of Markey, C.J., P.A. A-24.

Recognizing the evident inconsistency between the plurality opinion and the extension of immunity to the literally thousands of home rule cities acting in the absence of a state policy to displace competition, Respondent asks this Court to "clarify" *City of Lafayette.* However, the arguments advanced for this clarification (i.e., overruling) of recent controlling precedents have already been considered and rejected by a majority of the Court. The principle of *stare decisis* compels the rejection of these stale arguments, particularly in light of no Congressional action whatsoever to "clarify" the decision. The Respondent and its allies must accept the finality of the *City of Lafayette* decision.

Respondent's historical arguments evidence a basic unfamiliarity with the events surrounding the drafting and adoption of our Constitution. The Framers were distressed by the ineffectiveness of a government based on a confederation of states. These federalists sought an effective central government, not an ineffective one as Respondent implies. Certainly Madison would never have countenanced municipal power to make economic policy directly contrary to that enacted by the national Congress. In his view, any harm perceived by these local interests could be rectified by congressmen, primarily loyal to their local areas. The Federalist, No. 46.

Finally, Respondent overlooks the boon to competition effected by *City of Lafayette.* The opinion of the District Judge in this very case makes the point clear. The City argued that competition would be enhanced by the moratorium it imposed. The District Judge found otherwise. He found that there was no "natural monopoly" and that competition on the poles in the Boulder cable market was both economically and physically

possible (P.A. A-41). Even though he believed that Boulder possessed the power of the state over matters of local concern, he concluded that Boulder's scheme of market control, unconnected with normal regulation of public rights of way, was not entitled to immunity (P.A. A-42). To paraphrase the Chief Justice, in the District Court's view, control of cable television did not possess those "attributes of sovereignty" which in the mind of the Chief Justice, are one of the prerequisites to immunity. 435 U.S. at 423.

Perhaps the strongest argument dictating rejection of Respondent's attack on *City of Lafayette* is the action which followed the Tenth Circuit decision. Believing that it had antitrust immunity, and with complete disregard for the substantial evidence that districting would not lead to competition, Respondent divided the city into cable districts, notwithstanding its earlier protestations to the contrary.

II.

HOME RULE CITIES WERE EXPLICITLY INCLUDED WITHIN THE AMBIT OF *CITY OF LAFAYETTE*—A CONTRARY READING RENDERS THAT DECISION INCOMPREHENSIBLE

In *City of Lafayette,* this Court considered whether the antitrust laws apply to the anticompetitive practices of local governments. The majority was concerned that the grant of antitrust immunity to more than 60,000 units of local government would seriously distort "the rational and efficient allocation of resources, and the efficiency of free markets which the regime of competition embodied in the antitrust laws is thought to engender." 435 U.S. at 408. Thus cities were held not automatically immune from the antitrust laws.

Nonetheless, Respondent seeks to carve out an exemption from this holding so that home rule governments may obtain that immunity reserved to the states pursuant to *Parker* v. *Brown,* 317 U.S. 341 (1943). Respondent commences its defense of the Tenth Circuit decision with a primer on the development of home rule in general and Colorado home rule in particular. The aim of this historical exercise is to demonstrate how American cities, chafing under excessive state control, obtained autonomy over local affairs. Petitioner readily acknowledges the success of that effort in Colorado and throughout the country. (Chart following P.Br. App.)

Petitioner also agrees that, in instances of conflict between an ordinance of a Colorado home rule city on an issue of *purely* local concern and a statute enacted by the General Assembly, the ordinance prevails. Even assuming, arguendo, that cable television is a matter of purely local concern[2]—over which the General Assembly may not legislate in the face of contrary ordinances—the local autonomy which gives home rule cities plenary power over their affairs does not tranform these units of municipal government into states eligible for *Parker* immunity.[3]

The plurality notes that "[w]hen cities, each of the same status under state law, are equally free to approach a policy decision in their own way, the anticompetitive restraints adopted as policy by any one of them, may express its own preference, rather than that of the State." 435 U.S. at 414. The plurality, quite significantly we submit, supports this statement

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[2] Petitioner re-emphasizes that there has never been a finding by any Colorado court that cable television is a matter of purely local concern. *See, Community Communications Co.* v. *City of Boulder,* Memorandum Opinion and Order (P. A-36, A-41).

The Court of Appeals appeared to disregard this district court finding, relying instead on *Manor Vail Condominiums* v. *Town of Vail,* ____ Colo. ____, 604 P.2d 1168 (1980). The failure of the *Manor Vail* court even to consider the issue and the absence of conflicting state legislation which would have prompted such consideration undercuts use of *Manor Vail.* Other Colorado cases offer no clearcut guidance. *See, e.g., Denver Urban Renewal Authority* v. *Byrne,* ____ Colo. ____, 618 P.2d 1374 (1980) (urban blight is not purely local); *Century Electric Service & Repair, Inc.* v. *Stone,* 564 P.2d 953 (1977) (licensing of electrical contractors within city limits is of statewide concern); *Spears Free Clinic & Hospital* v. *State Board of Health,* 122 Colo. 147, 220 P.2d 872 (1950) (licensing of city hospitals is of statewide concern). Clearly, any conclusion that cable television must be of purely local concern since it only occurs within city limits is unjustified.

[3] Amicus Colorado Municipal League attempts to discredit the fact that only the state may declare state policy by noting that the principal Colorado case on point has been "overruled in part." (CML Br. at 15). Amicus fails to explain that *City and County of Denver* v. *Tihen,* 77 Colo. 212, 235 P.2d 777 (1925), still is good law on the point for which Petitioner cited it. Only the particular finding of the court was overruled. *Century Electric Service & Repair, Inc., supra,* at 954.

Respondent argues that all of the Colorado courts' discussions of home rule cities as lacking the attributes of "city-states" stem only from a pre-1920 constitutional objection. (R.Br. 21). This assertion is simply inaccurate. *City of Golden* v. *Ford,* 141 Colo. 427, 348 P.2d 951 (1960) ("Colorado municipalities are creatures of either legislative enactment or constitutional provision or both, as the case may be, and are not city states."); *City and County of Denver* v. *Sweet,* 138

with a footnote quoting language from *Avery* v. *Midland County*, 390 U.S. 474, 481 (1968), which specifically notes the vast authority local governments may have over matters of local concern:

> While state legislatures exercise extensive power over their constituents and over the various units of local government, the States universally leave much policy and decisionmaking to their government subdivisions. Legislators enact many laws but do not attempt to reach those countless matters of local concern necessarily left *wholly* or partly to those who govern at the local level.

435 U.S. at 414, n. 43 (emphasis added).

The plurality's citation to *Avery* is proof positive that the state mandate test was formulated specifically *because of*, not in spite of, the existence of home rule powers under which Respondent claims immunity.

This reading of the opinion is further supported by the plurality's treatment of a recent Louisiana case, cited by the *City of Lafayette* petitioners. That state case held that municipally-owned public utilities were under the exclusive jurisdiction of the municipalities.

Notwithstanding the Louisiana cities' contention that possession of this plenary power entitled them to immunity, as the ultimate body wielding the State's authority, the plurality saw this autonomy as indicating the *absence*, not the presence, of a state policy on which *Parker* immunity could be predicated.

When read in the context of the entire plurality opinion, the so-called "contemplation" test[4] is simply not susceptible to an interpretation granting home rule entities *Parker* immunity when acting in matters of local concern. The plurality's treatment of *Avery* v. *Midland County* and the Louisiana state court decision lead inescapably to the conclusion that immunity for home rule cities was considered and rejected by a plurality, if not a majority, of the Court. Moreover, the dissent's concern

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[4] 435 U.S. at 415. This language should be read to mean that the federal government will defer to a clear and affirmative state policy to displace competition even if it is not expressed in a "specific, detailed legislative authorization." However, there must still be a *state* policy, and it must still be clearly expressed. In this case, there is no state policy "whatsoever."

that the plurality opinion would hamper the governmental authority of home rule cities, 435 U.S. 434-35 nn. 14 & 15, a concern reflected in Respondent's brief, did not alter the majority's conclusion. Thus, placing broad home rule authority within the "contemplation" language of the plurality would eviscerate *City of Lafayette*, for it is precisely this plenary power over local concerns, which overrides contrary state statutes, that would allow a city to express "its own preference, rather than that of the State," or leave cities "free to make economic choices counseled solely by their own parochial interests and without regard to their anticompetitive effects." *Id.* at 414,408.

III.

THE CONCURRING OPINION OF THE CHIEF JUSTICE SUPPORTS REVERSAL OF THE TENTH CIRCUIT OPINION

The Petition for Certiorari took issue with the Tenth Circuit's view that Chief Justice Burger would only apply the antitrust laws to municipal activities when the municipality "was in the business" affected by municipal action. P. 15-18. Petitioner emphasized the Chief Justice's consistent refusal to imply exemptions to the antitrust laws, his concurrence in Part I of the plurality opinion, and pointed to his test on remand as more stringent than the plurality's test because it included the requirement of "State" compulsion.[5] 435 U.S. at 425, n.6. It was noted that even if the concurring opinion *had* advocated a proprietary-governmental test, Boulder's action was proprietary in character.

The concurring opinion should not be read as distinguishing between "proprietary" and "governmental" actions, but rather between a government's " 'functions [which are] essential to separate and independent existence' " and those which are not. *Id.* at 423-24. The Chief Justice noted that Lafayette's actions, as "proprietary" were not essential to the city's existence and therefore fell outside the protection offered by *Parker*. Of course, municipal action besides that characterized as "proprietary" would also render cities liable, but the Chief Justice saw no reason to extend his opinion to such cases.

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[5] Petitioner's interpretation of Chief Justice Burger's test finds additional support in a recent Ninth Circuit case. *Community Builders, Inc.* v. *City of Phoenix*, 652 F.2d 823, 829 (9th Cir. 1981).

The Chief Justice did state, however, that in reviewing allegedly anticompetitive municipal conduct, he would only exempt action which " 'was necessary in order to make the regulatory Act work, and even then only to the minimum extent necessary.' " *Id.* at 426. The reference to a "regulatory" act is an obvious reference to "governmental" as opposed to "proprietary" action.

We note that the trial judge engaged in this very analysis. He recognized that the city could "impose such restrictions on the hanging of cables as may reasonably be necessary to protect the public and other franchise users of such property." P.A. A-41. However, he concluded that Boulder's actions went beyond what was necessary to the valid regulation of cable television, and the city was thus not entitled to exemption.

> Assuming that Boulder does have the claimed authority to regulate cable television within the City in the manner which would be required to impose all of the terms and conditions in the draft ordinance which was submitted to the plaintiff and other cable companies, the approach taken is not an appropriate exercise and articulation of a policy of regulation. It is not characteristic of utility regulation for the regulating authority to negotiate with those to be regulated and then formulate the final policy by exercising legislative power through an offer and acceptance mechanism.

Id. A-42. In other words, Boulder's actions were not "essential to [its] separate and independent existence." 435 U.S. at 423. The city had other, less restrictive alternatives available to make its regulation of cable television work. *Id.* at 426. As the trial court noted:

> It might well be a different case if Boulder had enacted an ordinance articulating qualifying criteria for cable companies to do business in the City, with such other regulations as the government might believe to be necessary and proper in the exercise of police power, and then to confront the contention that such an ordinance has an anticompetitive effect. That is not this case.

P.A. A-42.

IV.

RESPONDENT'S REQUEST FOR "CLARIFICATION" ADVANCES STALE ARGUMENTS REJECTED BY THE COURT IN CITY OF LAFAYETTE. CONGRESSIONAL SILENCE SINCE THAT DECISION JUSTIFIES RELIANCE ON STARE DECISIS TO REJECT THESE ARGUMENTS AGAIN.

Part II of Respondent's Brief asks this Court to clarify *City of Lafayette*. The arguments advanced to support this "clarification," however, were raised by the Petitioners in *City of Lafayette*, adopted by the dissent, but rejected by a majority of this Court. Thus, Respondent's argument that the Sherman Act was not intended to impose liability on municipal governments simply restates the arguments set forth in pages 8, 9 and 16 of the Petitioner's brief in *City of Lafayette* (Pet. Br. No. 76-664), and advanced in the Stewart dissent. 435 U.S. at 392-93.[6]

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[6] A careful examination of the Act's legislative history does not support the contention that Congress never intended the antitrust laws to apply to acts of local governments. While the question of governmental liability was never addressed during the debates, the Congressional Record does indicate that the Act was aimed primarily at the harmful effects of anticompetitive *conduct* rather than a given class of actors. *See* Slater, *Antitrust and Government Action*, 69 N.W. L. Rev. 83 (1974). Attempts to restrict the reach of the Bill to private business combinations were defeated.

> [T]he provisions of this Bill are not confined to trusts, to combinations, to arrangements and agreements made between parties who are engaged in business; . . . but it brings within its grasp arrangements made by any persons, though merely for moral and defensive purposes.

20 Cong. Rec. 1458 (1889) (Senator George).

The prospect that the Act might inadvertently punish beneficial combinations while permitting harmful ones to evade liability inspired Senator Teller's remarks about "these great trusts, these great corporations, these large moneyed institutions." 21 Cong.Rec. 2562 (1890). He argued, along with several other senators quoted by Respondent, that the Bill should be more narrowly drafted so as to apply only to business combinations such as the Standard Oil Trust.

However, Senator Sherman defended the broad sweep of the Bill's provisions. As he construed it, the Act would not restrain literally "all" combinations, but rather, those "[whose] natural effects are injurious [and] tend to produce evil results." 21 Cong.Rec. 2456 (1890). He argued that Congress should not limit the scope of the

(footnotes continued on following page)

Respondent's parade of horribles also was argued to the Court by the Louisiana cities, reargued by the dissent, and rejected by the majority. The dissent (435 U.S. at 397-400) repeated Lafayette's and Plaquemine's predictions that antitrust liability "will have a chilling effect upon local decision-making and paralyze the functions of local government." Pet. Br. No. 76-864, at 7.

Similarly, the arguments that many aspects of municipal regulation will be subject to antitrust attack (R.Br. 34-36), that courts will have difficulty interpreting the state mandate request (R.Br. 36-37), and that cities should not be forced to seek legislative approval for every act (R.Br. 44), all represent concerns raised by the Petitioners in *City of Lafayette* (Pet. Br. No. 76-864 at 21, 19-20, and 23) and articulated by Justice Stewart (*see, e.g.*, 435 U.S. at 396-400).

Three years have passed since this Court's decision in *City of Lafayette.* Yet no Congressional action has been taken to "clarify" the majority holding that municipalities are subject to antitrust liability in some circumstances.

Since *City of Lafayette,* Congress has enacted two antitrust exemptions.[7] Public Law 96-308 (1980) exempts soft drink manufacturers from certain potential rule of reason violations if interbrand competition is shown to exist. This Act was passed in direct response to ongoing litigation instituted by the Federal Trade Commission. House Report No. 96-1118 (1980). Congress, however, took no action in response to *City of Lafayette,* notwithstanding the dire consequences predicted by Justice Stewart.

(footnotes continued from previous page)

Bill in advance lest its power to remedy the evils of monopoly be likewise limited. Thus, he favored wide applicability, coupled with reliance on judicial discretion to apply the doctrine as needed on a case by case basis. 21 Cong.Rec. 2460 (1890).

[7] P.L. 96-30, 42 U.S.C. 6272(j) (1979) (extending oil companies' exemption when participating in the Agreement on an International Energy Program); P.L. 96-308, 15 U.S.C. 3501 (1980) (soft drink bottlers' exemption). The Senate Judiciary Committee was referred no bills, held no hearings, and took no action on municipal immunity in the session following the *City of Lafayette* decision. *See,* Annual Activities Report of the Committee on the Judiciary, 110-17 (1980).

Respondent essentially asks this Court to ignore the rule of *stare decisis* and overrule *City of Lafayette*. Yet the present fact situation—Congressional silence following a Court decision construing a statute—is precisely one where the doctrine of *stare decisis* is the most persuasive. As this Court stated in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977):

> In considering whether to cut back or abandon the Hanover Shoe rule, we must bear in mind that considerations of stare decisis weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation. [Citations]. This presumption of adherence to our prior decisions construing legislative enactments would support our reaffirmance of the Hanover Shoe construction of § 4, joined by eight Justices without dissent only a few years ago, even if the Court were persuaded that [the earlier decision was incorrect].

Id. at 736-37 [footnote omitted].

Similarly, this Court has held that:

> by reason of stare decisis and by reason of Congress' failure to make any statutory change upon again reviewing the subject, we regard the principle enunciated in [an earlier Supreme Court decision] as controlling.

Laird v. Nelms, 406 U.S. 797, 802 (1972) (Rehnquist, J.). *See also, Monell v. Department of City Services*, 436 U.S. 658 (1978) (Rehnquist, J. dissenting). *Cf., Texas Industries v. Radcliff Materials*, ____U.S.____, 68 L.Ed.2d 500, 513 (1981) (Burger, C.J.).

V.

THE REQUIREMENTS OF CITY OF LAFAYETTE HAVE PROVEN WORKABLE AND ARE APPROPRIATE IN THE INSTANT CASE

Although Respondent claims that the *City of Lafayette* decision has resulted in unacceptable limitations upon local governmental actions, lower federal courts have been effectively applying the standards of *City of Lafayette* since that opinion was handed down. The Court's guidance has proven to be well-adapted to the examination of the validity of municipal regulation.

Petitioner's opening brief listed several cases that illustrate that the *City of Lafayette* tests are useful in preventing undesirable anti-competitive conduct of cities (see P. Br. fn. 24 and 30). Since that brief was written, a Ninth Circuit Court of Appeals decision illustrating the feasibility of the *City of Lafayette* tests has been issued. *Community Builders* v. *City of Phoenix,* 652 F.2d 823 (9th Cir. 1981) involved horizontal division of territory for the municipal water utility districts of Phoenix and Scottsdale, Arizona. The plaintiff, located in an unincorporated area between the defendant cities, argued that defendants violated the antitrust laws by not allowing plaintiff to choose which municipal system would serve it. The Ninth Circuit found that the plurality's test of "conduct engaged in . . . pursuant to state policy to displace competition with . . . monopoly public service" was satisfied by Arizona's "explicit policy prohibiting competition between municipalities in the provision of utility service." *Id.* at 829. This, in turn, was based upon an Arizona statute, A.R.S. § 9-516, which sought the "elimination of competition between municipal utility services and other utility providers." *Id.* at 829. Under the Arizona law, "[s]o long as that service [provided by the existing utility] is adequate, Arizona law prohibits the institution of a competing service . . . ." *Id.* at 830. Having determined that water utility service was a natural monopoly (*id.* at 829), Arizona has decided that there will be no competition allowed for utility services, and having done so, thereby exempts municipalities from antitrust liability.

Colorado, however, has no state policy forbidding cable television companies from competing in the market for subscribers. Colorado, in fact, has rejected the notion that cable television is a natural monopoly (*Re The Mountain States Telephone & Telegraph Co.,* (Colo. P.U.C. 1968), P.A. at A-86-88), a finding made again by the trial judge in the instant case, who found that unobtrusive and safe competition on the poles is possible.[8] Furthering the goal of the antitrust laws to "guarantee every enterprise the right to exercise 'whatever economic muscle it can muster' [citation omitted] without regard to the amount of influence it might have with local or state legislatures" (*City of Lafayette, supra,* 435 U.S. at 407),

[8] It is also self-evident that a First Amendment disseminator is not a public utility. *See e.g., Television Transmission Inc.* v. *Public Util. Comm.,* 47 Cal.2d 82, 89, 310 P.2d 862 (1956).

the trial court sought to preclude any further restraint on trade while allowing regulation to protect public safety. The Tenth Circuit's decision and the subsequent city action, permanently restraining competition in the market for the same customers, vividly indicates the damage to competition wrought by exempting municipal governments from the antitrust laws. *Parker* immunity, which must be narrowly confined, only exists because the national policy of free competition is superseded by the even stronger policy of deference to certain clear State action.

Contrary to cries of an impending Armageddon that will allegedly follow a decision permitting competition for cable television subscribers (CTIC amicus brief), America's cities and their residents will not only survive but will prosper under a regimen of free competition. Absent both State action and Congressional interference, it simply cannot be assumed that "monopolistic arrangements will better promote trade and commerce than competition." *National Society of Professional Engineers* v. *United States,* 435 U.S. 679, 689 (1978).

A further look at Phoenix, Arizona reveals that competition for cable television subscribers may be encouraged without destroying the ability of municipalities to govern. The record in this case reveals that Carl Pilnick, Boulder's expert witness, recommended that Phoenix not negotiate more than one permit, (R.T. 146:8-147:7). However, judicial notice can be taken of Phoenix Ordinances which permit three cable companies to serve the entire city while a fourth company requested and was permitted to serve a particular area of that municipality.[9] Phoenix thereby furthered the policy of the antitrust laws to allocate resources more efficiently by allowing consumers to choose which company's product they wish to purchase. The Tenth Circuit would frustrate that policy.

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[9] License No. 17633 between the City of Phoenix and American Cable Television, Inc., dated Nov. 24, 1976 (citywide); License No. 25333 between the City of Phoenix and Cross County Cable dated Sep. 2, 1980 (citywide); License No. 25332 between the City of Phoenix and Camelback Cablevision, Inc. dated Sep. 2, 1980 (citywide); License No. 25334 between the City of Phoenix and Western Cablevision Services, Inc. dated Sep. 2, 1980 (single district).

VI.

RESPONDENT'S FEDERALISM ARGUMENTS ARE UNSUPPORTED BY HISTORY OR THE DOCTRINE OF DUAL SOVEREIGNTY UNDERLYING THE CONSTITUTION AND *PARKER V. BROWN*

A. Respondent Turns The Views of the Framers of the Constitution On Their Heads.

Contrary to Respondent's assertions, the Framers of the United States Constitution did not intend or foresee municipal immunity from fundamental national policy. The purpose of the new Constitution was to create an effective source of national policy. Under the decentralized Articles of Confederation, our Union had suffered from the lack of coordination resulting from thirteen different views of where the public interest lay. *See generally,* The Federalist, Nos. 15-21. To contend, as Respondent apparently does, that Madison and Hamilton would have supported any theory resulting in the freeing of tens of thousands of individual policy-making bodies to choose when and how often to comply with a federal statute can best be characterized as "mistaken."[10]

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[10] Respondent supports its argument by citation to a rhetorical question posed by Madison in The Federalist, No. 45 (R.Br. 41):

> Was then, the American Revolution effected, was the American Confederacy formed, was the precious blood of thousands split, and hard-earned substance of millions lavished, not that the people of America should enjoy peace, liberty, and safety, but that the governments of the individual States, that particular municipal establishments, might enjoy a certain extent of power of sovereignty?

A cursory examination of the surrounding language that Madison referred to the *States* when he referred to "particular municipal establishments." There is not a shred of evidence to indicate his contemplation of cities anywhere in this portion of the letters.

But even more telling is the fact that Madison answers his question with a resounding "No!" and not a "yes" as Respondent implies. The Framers clearly saw a greater public good resulting from a shift of power to the Federal government than from locally and individually determined policies. This greater good required the concession of some powers by the States. Local recognition of this basic fact underlay the ultimate ratification of the Constitution, and was the basis of agreement for a majority of the Justices in *City of Lafayette.*

The Founding Fathers envisioned a shift of authority over national policy from state governments to the federal government. By joining the United States, each State acknowledged federal supremacy in relation to policies adopted for the collective good. One of these limits, as delineated by this Court, denies the States the uncontrolled right to freely delegate their antitrust exemption. Certainly, it cannot be said that the architects of our federal system contemplated a state of affairs where municipal officials would be permitted to flaunt laws enacted by the federal legislature.[11]

Thus, Respondent is unsuccessful in its attempt to invoke historical support for its arguments. Both political theory and political fact reveal that city antitrust exemption should only exist when the state has clearly and affirmatively expressed the desire that the challenged restraint take place.

B. Application Of The National League Of Cities v. Usery Rule Does Not Justify Immunity In This Case

In *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), this Court explained that federal legislation may run afoul of the Commerce Clause if it interfered with "attributes of sovereignty" which are " 'essential to separate and independent existence . . . .' " 426 U.S. at 845.

Contrary to Respondent's reading of the case, this Court made it quite clear that the mere exercise of an "attribute of sovereignty" is insufficient—a showing must be made that the state has exercised "functions essential to separate and independent existence," [citation] so that Congress may not abrogate the States' otherwise plenary authority to make them." *Id.* at 845-46.

Surely Respondent does not contend that the regulation of cable television—and, in particular, the power to exclude a willing cable operator—is a "function essential to separate and

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[11] Hamilton was even more emphatic than was Madison in rejecting the concept of unlimited state and/or local sovereignty.

> "They [the opponents of the proposed Constitution] still, in fine, seem to cherish with blind devotion the political monster of an *imperium in imperio.*"

The Federalist, No. 15 at 108.

It is, of course, one thing to say that particular states may create an *imperium in imperio* (empire within empires) within their borders, but quite another to assert that such creation not only supersedes state policy but federal legislative policy as well.

independent existence." Such action has not been a traditional activity of cities and does not go to the heart of a city's ability to exist as an entity.

The factual background in *Usery* involved states and municipalities handling their own internal affairs. The Court noted that without "the authority to make those fundamental employment decisions upon which their systems for performance of these [public safety] functions must rest, we think there would be little left of the States' " 'separate and independent existence.' " *Id.* at 851.

Usery can be distinguished from the present case by the importance of the federal interest as well. While the Fair Labor Standards Act was but one in a series of commerce regulations enacted in the pre-war period, the antitrust laws "are as important to the preservation of economic freedom and our free enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *United States* v. *Topco Associates, supra,* 405 U.S. at 610. They reflect "the fundamental principle governing commerce in this country," *City of Lafayette, supra,* 435 U.S. at 398, and a "fundamental national economic policy . . . ." *Id.* at 419 (Burger, C.J.). Such an overriding federal interest must justify minor limitations upon local autonomy.

Finally, it is by no means clear that the teachings in *Usery* are to be applied with equal force to municipalities as well as states, particularly in applying the antitrust laws. Under every formulation of the municipal/agency exemption, appropriate state action will immunize the city or agency action. Even in Colorado, the State may authorize displacement of competition by home rule cities acting in an area of "purely local" concern. (P.Br. 28-29). Thus, concern for "our dual system of government" *Parker, supra,* 317 U.S. at 351, in no way suggests *municipal* exemptions to the antitrust laws. *City of Lafayette, supra,* 435 U.S. at 412, n. 42.

C. Individual State Law Should Not Be Incorporated Into A Federal Statute Which Reflects A "Fundamental National Economic Policy".

Respondent (R.Br. 12-20) and *amicus* Colorado Municipal League (C.M.L.Br. 6-16) expend considerable energy in attempting to characterize Colorado home rule cities as uniquely empowered to make final determinations of local policies.

Whatever the accuracy of these assertions (see Chart following P.Br. App.), they point out an underlying problem with Respondent's position: The Sherman Act is a *national* law intended to have uniform application throughout the country. Construction of the antitrust laws should not turn on the eccentricities of particular internal state structures. As Justice Stewart noted, "the applicability of the federal antitrust laws is a matter of federal, not state, law . . . ." 435 U.S. at 436, n. 18.

This Court has frequently recognized the importance of uniformity in the application of federal laws. *NLRB* v. *Natural Gas Utility District*, 402 U.S. 600, 603-604 (1971). Certainly this rule applies to the economic regulatory scheme which comprises our "fundamental national economic policy." *City of Lafayette, supra*, at 419 (Burger, C.J. concurring).

Adoption of Respondent's plan for expanding the state-action exemption would necessitate an examination of every state's distribution of power. Freedom to engage in anticompetitive behavior would vary drastically from state to state. Hinging antitrust immunity on a determination of the degree of a city's autonomy would enmesh federal courts in the complex and confusing state law issue of whether a matter is of local or statewide concern.[12] Proceeding on a case-by-case basis

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[12] The vast majority of states look to each subject matter on a case by case basis to determine whether the matter is within the city's complete control. For example, pension plans for local policemen or firemen are of local concern in California, but are of statewide concern in Oregon and Rhode Island, and of mixed state and local concern in Colorado. *Richards* v. *Wheeler*, 10 Cal.App.2d 108, 51 P.2d 436 (1935); *City of Lagrande* v. *Public Employment Retirement Board*, 281 Ore. 137, 576 P.2d 1204 (1978); *Marro* v. *General Treasurer of City of Cranston*, 108 R.I. 192, 273 A.2d 660 (1971); *Huff* v. *Mayor and City Council of Colorado Springs*, 182 Colo. 108, 512 P.2d 632 (1973). The administration of police, fire, and water departments in Hawaii is of local concern, but the civil service and compensation for employees of those departments is of statewide concern. *Hawaii Government Employees Association* v. *County of Maui*, 59 Hawaii 65, 576 P.2d 1029 (1978). Civil service for city employees is of local concern in Ohio. *Lentz* v. *Edwards*, 90 Ohio St. 305, 107 N.E. 768 (1914). Collective bargaining with the city fire department is of mixed state and local concern in Colorado (*City of Aurora* v. *Aurora Firefighters' Prot.*, 193 Colo 437, 566 P.2d 1356 (1977)), while dismissal procedures for city officers is of local concern (*Ratcliff* v. *Kite*, 36 Colo.App. 261, 541 P.2d 88 (1975)), and the recall of city

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pursuant to Respondent's approach, federal courts in different districts could well treat identical municipal anticompetitive conduct differently. The determinations in each case would depend on whether the city enjoyed home rule powers and whether the particular activity involved a matter of purely local concern. Often, as in the instant case, the state court may be silent on whether the matter is purely local, statewide or of mixed state and local character. An Arizona court said it well in noting that, "a perusal of cases from other jurisdictions indicates that there is a twilight zone wherein it is difficult to discern with positive assurance that legislation is of general concern, or is merely of local or municipal concern." *City of Tuscon* v. *Arizona Alpha of Sigma Alpha Epsilon*, 67 Ariz. 330, 336, 195 P.2d 562, 566 (1948).

In the present case, this problem is illustrated by the embroilment of the Colorado Courts over what matters constitute those "solely of local concern." Compare *State Farm Mutual Automobile Insurance Co.* v. *Temple*, 176 Colo. 537, 491 P.2d 1371 (1971), and *Hamilton* v. *City and County of Denver*, 176 Colo. 6, 490 P.2d 1289 (1971), with *Century Electric Service and Repair* v. *Stone*, 564 P.2d 953 (1977), and *City and County of Denver* v. *Tihen*, 77 Colo. 212, 235 P. 777 (1925). Would Respondent have application of the federal antitrust laws hinge upon the distinctions among an assessment tax on cemeteries (*Tihen, supra*); an occupational privilege tax on state workers (*Hamilton, supra*); an occupational tax on insurers (*State Farm Mutual Automobile Insurance Co., supra*); and a licensing scheme for electricians (*Century Electric Service and Repair, Inc., supra*)? Determination of what is "solely" local may change over time from new circumstances. *City and County of Denver* v. *Sweet*, 329 P.2d 441 (1958). Given the plethora of litigation on this issue in Colorado, it is difficult to understand how Respondent can argue that immunity for

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186 Colo. 81, 525 P.2d 416 (1974)). A total earnings tax is "not a purely local" concern in Missouri (*Grant* v. *Kansas City*, 431 S.W.2d 89 (Mo. 1968)), nor is the collection of property taxes "a home rule power or function" in Illinois (*Bridgeman* v. *Korzen*, 54 Ill.2d 74, 295 N.E.2d 9 (1972)). But taxation of liquor is a matter of local concern there (*Mulligan* v. *Dunne*, 61 Ill.2d 544, 338 N.E.2d 6, *cert. denied* 425 U.S. 916 (1975)), and real property taxes are a matter of local concern in Connecticut (*Caulfield* v. *Noble*, 178 Conn. 81, 420 A.2d 1160 (1979)).

actions taken on "local matters" would reduce a municipality's exposure to lawsuits. (R.Br. 37-38). In fact, what Respondent really desires is the sort of "blanket" immunity rejected in *City of Lafayette, supra.*

VII.

CONCLUSION

For the foregoing reasons, the Tenth Circuit opinion, granting wholesale immunity to home rule cities, even in the absence of state policy, should be reversed.

Respectfully Submitted,

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IN THE

United States Court of Appeals

TENTH CIRCUIT

COMMUNITY COMMUNICATIONS COMPANY, INC.,
Plaintiff-Appellee,

v.

CITY OF BOULDER, COLORADO,
Defendant-Appellant.

No. 80-1882

Appeal from the United States District Court for the District of Colorado (D.C. No. 80-M-62)

Before SETH, Chief Judge, SEYMOUR, Circuit Judge, and BOHANON,* District Judge.

SEYMOUR, Circuit Judge.

* Of the Northern, Eastern and Western Districts of Oklahoma, sitting by designation.

We have been once again asked to reverse a grant by the district court of a preliminary injunction against the City of Boulder, Colorado (City) enjoining the City from enforcing a legislative restriction on the authority of Community Communications Company (CCC) to conduct its cable television business in Boulder. *See Community Communications Co.* v. *City of Boulder,* 485 F.Supp. 1035 (D. Colo.), *rev'd,* 630 F.2d 704 (10th Cir. 1980) (*Boulder I*). This time the district court preliminarily barred the City from limiting CCC's authorized operations to the geographic area described in Boulder City Ordinance No. 4515.[1] For the reasons set forth below, we believe that during the pendency of this litigation CCC should only be permitted to conduct such operations in the City of Boulder as are necessary to fully provide cable services to customers throughout the area contemplated by Ordinance No. 4515, and to customers outside that area who were actually connected to CCC's cable system as of May 18, 1981.[2] In

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[1] Ordinance 4515 states in pertinent part:

"*Section 1.* That the revocable permit granted under Ordinance No. 2846 to Colorado Televents, Inc. and its assignee, Community Communications Company, Inc., to conduct the business of a community antenna television system in the City of Boulder is hereby partially revoked, as hereinafter provided.

"*Section 2.* That Ordinance No. 2846 is hereby amended by the addition of the following:

"The grantee's right, permit license and privilege to erect, construct, operate and maintain on, under and above the present and future streets, alleys, highways and other public ways and places of the City of Boulder, such poles, lines, cables, wiring and related appurtenances as are necessary for the purpose of originating, receiving, amplifying and distributing television and radio signals to the inhabitants of the City of Boulder shall be exercised only within the geographical boundaries set forth in Exhibit A, attached to this ordinance and incorporated by reference herein.

"In addition to any and all of the remedies available to the City, a violation of this Section shall be grounds for immediate revocation of the permit granted in Ordinance No. 2846 and forfeiture of the performance bond referred to therein.

"The right, permit and privilege herein granted is subject to such reasonable requirements as the City Council may subsequently adopt concerning interconnection with other cable systems in the City of Boulder."

[2] This is the substance of this court's order of May 18 as clarified July 9, 1981.

addition, we conclude the City should be preliminarily barred from issuing any exclusive cable franchise to another cable company for any remaining portion of Boulder until a decision has been rendered on the merits of this case. To the extent the district court's preliminary injunction is inconsistent with these conclusions, it is reversed.

I.

The First Injunction

In 1964, the City Council of Boulder granted a nonexclusive, revocable permit to a predecessor of CCC, authorizing but not requiring the company to provide cable broadcasting services to all of Boulder. The permit was issued in the form of an ordinance allowing use of the public ways to string cable for a period of twenty years, with the reservation that the City Council could revoke the permit at its pleasure at any time. In 1966, the permit was assigned to CCC.

Under the permit, CCC chose for roughly 15 years to provide cable television service only to the University Hill area of Boulder, an area comprised of approximately 20% of Boulder's residential units and blocked off from normal reception of Denver television stations. In 1979, CCC informed the City of its plans to expand the area it served and the programming it carried. Shortly thereafter, the City received a request from Boulder Communications Company (BCC) for a cable television permit. BCC indicated that regardless of the action the City took in regard to CCC, it planned to begin building a new system as soon as possible after it received a permit.

In response to these developments, the City undertook a study of cable broadcasting technology and concluded that cable systems are natural monopolies. Consequently, the City became concerned that CCC, because of its headstart, would always be the only cable operator in Boulder if allowed to expand, even though it might not be the best operator Boulder could otherwise obtain. The City decided to place a moratorium on CCC's expansion in order to provide other companies the opportunity to make bids to service the remaining parts of Boulder before CCC could become so entrenched that new

entry would be impracticable. On December 18, 1979, the City Council enacted a moratorium to restrict CCC from expanding its area of service for 90 days.

On January 15, 1980, CCC filed a complaint against the City in federal district court. The complaint listed several grounds for relief including allegations that the City's actions violated section 1 of the Sherman Act, 15 U.S.C. § 1, and the First Amendment. CCC continued to string cable. When the City tore down some of the new cable, CCC sought a preliminary injunction from the district court to enjoin enforcement of the moratorium.

In its March 17, 1980 decision, the district court recognized that the case presented significant First Amendment questions, but found them "not now ripe for decision." *Boulder I*, 485 F.Supp. at 1040. It focused instead on the Sherman Act claim and granted a preliminary injunction against the City on that basis. The City appealed.

This court reversed in a May 28, 1980 decision. We concluded that the trial court had erred as a matter of law in grounding a preliminary injunction on the Sherman Act claim. *See Boulder I*, 630 F.2d 704, 708 (10th Cir. 1980). Because authorization to use public ways for provision of cable service is a matter of local governmental concern,[3] we held the home-rule City of Boulder to be immune from antitrust liability under the state action doctrine of *Parker* v. *Brown*, 317 U.S. 341 (1943). We noted that the district court had "expressed no other basis for the restraining order than the antitrust factor." *Boulder I*, 630 F.2d at 708.

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[3] We did not hold in *Boulder I* that cable television is matter of *purely* local concern. There may be a significant state interest in many aspects of the operation of this communication medium. A home rule city may pass legislation regarding a "matter of 'mixed' state and local concern," provided the regulations do not conflict with legislation enacted by the state. *City of Aurora* v. *Martin*, 181 Colo. 72, 507 P.2d 868, 869 (1973) (*quoting Woolverton* v. *Denver*, 146 Colo. 247, 361 P.2d 982 (1961)). *See Denver Urban Renewal Auth.* v. *Byrne*, 618 P.2d 1374, 1385 (Colo. 1980); *Century Elec. Serv. & Repair, Inc.* v. *Stone*, 193 Colo. 181, 564 P.2d 953, 955 (1977) (en banc); *Vick* v. *People*, 166 Colo. 565, 445 P.2d 220, 221 (1968) (en banc), *cert. denied*, 394 U.S. 945 (1969).

II.

The Second Injunction

The 90-day moratorium had expired by the time of our decision in *Boulder I*, so the City enacted emergency ordinances on June 3 and June 24 placing further temporary restrictions on CCC's expansion in Boulder while the City considered its alternatives. By this time, three companies besides CCC had submitted proposals to provide cable services to Boulder. However, these other companies, including Boulder Communications Company, indicated they would not accept a permit in any area where CCC had authority to string cable.

The City concluded that direct competition in Boulder between cable companies within the same geographic area will not be possible in the foreseeable future. It settled on districting as the best practicable alternative. Under the City's plan, CCC will be restricted to servicing a single district comprising approximately one-third of the City's population. One or more cable companies will be granted permits to service other districts within Boulder. The City believes that although it cannot have direct competition, the districting plan will at least provide comparison. That is, by having more than one cable company operating in Boulder, the City will have a comparative basis for evaluating permit renewal applications. The City also believes that districting will achieve diversity of cable communications, especially if interconnection is required among cable systems whereby each cable company would make available to its subscribers some portion of the programming carried by other cable companies. In sum, through districting the City hopes to provide for its citizens multipurpose, state-of-the-art cable communication services, including, for example, not only extensive programming but also two-way communications through the cable system.

To begin implementing its districting plan, the City enacted Ordinance No. 4515, *see* note 1 *supra*, which partially revoked CCC's long-standing permit and replaced it with a permanent geographic limitation on CCC's authority to operate a cable system in Boulder. CCC responded by filing a second

motion with the district court for a preliminary injunction. The City cross-moved to enjoin CCC from violating the limitations of the new ordinance.

The district court denied the City's motion and granted another preliminary injunction in favor of CCC, reasoning that the cable company had demonstrated irreparable harm and a reasonable probability of success on the merits of both its Sherman Act and First Amendment claims. *See Community Communications Co.* v. *City of Boulder,* 496 F.Supp. 823 (D. Colo. 1980) (*Boulder II*). On appeal, the City challenges the trial court's reasoning on both grounds.

As an initial matter, we note that the cable broadcasting industry has a prior history of federal, state, and local regulation. *See, e.g.,* Besen, *The Deregulation of Cable Television,* 44 Law & Contemp. Prob. 79 (1981); Comment, *Technology Meets Bureaucracy, The FCC's Policy for Two-Way Television,* 31 Fed. Com. L.J. 413 (1979). Generally, regulation has been premised upon cable companies' need to use public streets and rights of way to lay or string their cable. Local regulation has commonly taken the form of licensing or franchising cable companies. *See generally* Albert, *The Federal and Local Regulation of Cable Television,* 48 Univ. Colo. L. Rev. 501, 508-13 (1977). The question in the present case is whether the City has gone too far under either the antitrust laws or the First Amendment in its efforts to regulate CCC's cable operations.

A. Antitrust Immunity

To the extent the lower court grounded its order on the Sherman Act claim, it is in error. In *Boulder I,* we reversed the district court's earlier grant of an injunction because we held the City immune from antitrust liability for its action in placing a moratorium on CCC's expansion.[4] The reasoning of *Boulder I* applies here as well. That the geographic restriction is now a permanent one, rather than a 90-day one, does not alter the applicability of the *Parker-Midcal* doctrine discussed at length in *Boulder I. See* 630 F.2d at 707-08. The districting program

[4] The Supreme Court has granted certiorari on this issue. *See* 49 U.S.L.W. 3736 (Apr. 6, 1981).

remains a clearly expressed act of government; active supervision and enforcement is being pursued. *See California Retail Liquor Dealers Association* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980).

The district court reasoned that "actively supervised" under *Midcal, id.* at 105, means "the City must take control of the future of cable television in Boulder in a manner which is actually *proprietary.*" *Boulder II*, 496 F.Supp. at 828 (emphasis added). The district court concluded, therefore, that the City is not entitled to antitrust immunity under our reading of *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389 (1978). *See Boulder I*, 630 F.2d at 708 (antitrust immunity not extended in *Lafayette* to government acting in proprietary fashion). The district court's reasoning is flawed because if active supervision is to be equated with proprietary action, governmental antitrust immunity could never exist.

B. First Amendment

CCC contends that the districting ordinance violates the First Amendment in several ways. First, the ordinance is said to constitute an unlawful prior restraint on CCC's right to disseminate information because the ordinance denies CCC the right to reach two-thirds of its potential audience. Second, the ordinance is alleged to be an unconstitutional content-based restraint on expression, because it bans CCC's communications from most of Boulder so that a "better" speaker, *i.e.*, one who will offer special services such as two-way communications, may service that area. Fiinally, CCC claims the ordinance is not the least restrictive means for achieving whatever legitimate interests the City may have. Thus, CCC essentially argues that the City's ordinance must be summarily declared unconstitutional because analogous prohibitions on a newspaper's right to reach even a small portion of its audience would be struck down as First Amendment violations. CCC contends that cases involving regulation of wireless broadcasters are wholly inapposite. The district court apparently accepted this view, for it stated that any differences between the freedom of newspapers and that of cable operators are not relevant to this case. *See Boulder II*, 496 F.Supp. at 829.

The City responds that (1) cable companies should not be analogized in every respect to newspapers for First Amendment purposes; (2) cable systems are natural monopolies, so that subjecting them to some reasonable regulation designed to achieve optimal use of the cable broadcasting medium does not offend the First Amendment; and (3) the ordinance, contemplating as it does the ultimate interconnection of all cable systems operating in Boulder, is a content-neutral regulation that promotes citizenry First Amendment interests in diverse and state-of-the-art communications services and programming, without impeding any cable operator's ability to reach audiences, since all audiences in the City will ultimately be reachable through interconnection.

These contentions reach us in the context of requests by both CCC and the City for preliminary injunctive relief. The touchstone for obtaining such relief is a showing of irreparable harm coupled with a substantial likelihood of success on the merits. *See Lundgrin* v. *Claytor,* 619 F.2d 61, 63 (10th Cir. 1980). "There must exist a probable right and a probable danger." *Crowther* v. *Seaborg,* 415 F.2d 437, 439 (10th Cir. 1969). However, where irreparability exists and the balance of hardships tips in favor of a movant, the probability-of-success requirement may be somewhat relaxed: "[I]t will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful as to make them a fair ground for litigation and thus for more deliberate investigation." *Lundgrin,* 619 F.2d at 63; *see Jack Kahn Music Co.* v. *Baldwin Piano & Organ Co.,* 604 F.2d 755, 758-59 (2d Cir. 1979).

Applying these principles here, we agree with the district court that this case raises substantial, difficult, and novel First Amendment concerns. Cable operators, like publishers and wireless broadcasters, are entitled to First Amendment protection. *See Midwest Video Corp.* v. *FCC,* 571 F.2d 1025, 1052-57 (8th Cir. 1978), *aff'd on other grounds,* 440 U.S. 689 (1979); *Home Box Office, Inc.* v. *FCC,* 567 F.2d 9, 43-51 (D.C. Cir.), *cert. denied,* 434 U.S. 829 (1977). We also agree with the district court that "[t]o the extent that First Amendment rights are infringed, irreparable injury is presumed." *Boulder II,* 496

F.Supp. at 826 (citing *Elrod* v. *Burns*, 437 U.S. 347, 373 (1976)). But we believe that in comparing "the competing claims of irreparable injury," *id.*, the district court failed to consider that the citizens of Boulder also have significant First Amendment interests at stake.[5] The City claims that its districting plan will advance its citizens' First Amendment interests in high quality and diverse cable communications services and programming, including two-way cable services that will enable its citizens to be disseminators of information as well as recipients.

With respect to the likelihood of success on the merits, the specific issue here is whether the City's geographic districting plan for cable operators violates the First Amendment. More broadly, the issue concerns the nature and degree of governmental regulation that the First Amendment permits over cable operators.

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[5] The First Amendment protects not only the right to disseminate, but also the public's interest in the receipt of diversified communications. "That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public . . . ." *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945). *See National Assoc. of Theatre Owners* v. *FCC*, 420 F.2d 194, 207 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 922 (1970). And the First Amendment right to receive information has been upheld in various contexts. See, *e.g.*, *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Procunier* v. *Martinez*, 416 U.S. 396, 408-09 (1974); *Kleindienst* v. *Mandel*, 408 U.S. 753, 762-63 (1972).

The Supreme Court has relied on the uniqueness of the wireless broadcasting medium coupled with the recognition that "[i]t is the purpose of the First Amendment to preserve an *uninhibited* marketplace of ideas . . . rather than to countenance *monopolization* of that market," and that "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount," to uphold affirmative regulation by the Government to enhance the diversity of information in broadcasting. *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 390 (1969) (emphasis added). Whether comparable considerations constitutionally permit similar regulation of cable has been the subject of much attention. *See, e.g.*, Note, *Midwest Video Crop* [*sic*] v. *FCC: The First Amendment Implication of Cable*

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At this juncture, facing as we do challenges to preliminary injunctive relief and an incomplete factual record, we cannot dispose of all the points raised by CCC and the City.[6] We do,

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Television Access, 54 Ind. L.J. 109, 116-23 (1978); Note, *FCC Regulation of Cable Television,* 54 N.Y.U.L. Rev. 204, 229-35 (1979); Note, *FCC Regulation of Cable Television Content,* 31 Rutgers L. Rev. 238, 248-58 (1978). Some commentators believe that through "structural" forms of regulation, such as mandatory access requirements and regulation limiting ownership concentration, it is possible, indeed desirable, to promote diversity in cable television while avoiding some of the objectionable aspects of broadcast regulation. *See, e.g.,* Bazelon, *The First Amendment and the "New Media" — New Directions in Regulating Telecommunications,* 31 Fed. Com. L.J. 201 (1979); Bollinger, *Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media,* 75 Mich. L. Rev. 1, 26-37 (1976); Price, *Taming Red Lion: The First Amendment and Structural Approaches to Media Regulation,* 31 Fed. Com. L.J. 215 (1979). *See also* Lee, *Antitrust Enforcement, Freedom of the Press, and the "Open Market": The Supreme Court on the Structure and Conduct of Mass Media,* 32 Vand. L. Rev. 1249 (1979). We raise these points here to show that the First Amendment interests of cable viewers cannot be left out of the equation for permissible regulation of cable companies. *See generally Home Box Office, Inc.* v. *FCC,* 567 F.2d 9, 48-49 (D.C. Cir. 1977).

[6] CCC asserts, and the district court seemingly agrees, that the districting ordinance is only one aspect of a regulatory plan that will "inexorably" lead to some regulation of programming, such as mandated reservation of some channels for public access. To the extent true, this allegation would raise a significant First Amendment issue. *See FCC* v. *Midwest Video Corp.,* 440 U.S. 689, 709 n.19 (1979). A similar issue surrounds Ordinance 4515's language that the City may in the future require "reasonable . . . interconnection with other cable systems in the City of Boulder." *See* note 1 *supra.* The City views interconnection as undercutting CCC's claim that the districting ordinance bars it from reaching a huge segment of its audience. Interconnection, the City contends, will guarantee every cable operator a city-wide audience in that a single network of cable wires will be shared by all. CCC, on the other hand, likens interconnection to coerced public access to its cable channels in that interconnection, according to CCC, will deprive one cable permit holder of the editorial discretion over whether to carry the programming of another. We, of course, intimate no view at this juncture on how these issues might be resolved, for on the present record they are not fully ripe for consideration. Nothing in the record now suggests

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however, agree with the City's contention that it was inappropriate for the district court to summarily apply to cable operators the First Amendment principles governing newspapers. The nature and degree of protection afforded to First Amendment expressions in any given medium depends upon the medium's particular characteristics. For example, the degree to which the First Amendment shields the editorial discretion of wireless broadcasters differs substantially from the degree to which newspaper publishers are shielded from governmental interference. *Compare Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969), *with Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974). The Supreme Court has repeatedly emphasized that "[e]ach medium of expression, of course, must be assessed for First Amendment purposes by standards suited to it," *Southeastern Promotions, Ltd.* v. Conrad, 420 U.S. 546, 557 (1975), for "differences in the characteristics of news media justify differences in the First Amendment standards applied to them." *Red Lion*, 395 U.S. at 386. *See, e.g., Metromedia, Inc.* v. *City of San Diego*, 49 U.S.L.W. 4925, 4928, 4932, 4935 (U.S. July 2, 1981); *Heffron* v. *International Society for Krishna Consciousness*, 49 U.S.L.W. 4762, 4765 (U.S. June 22, 1981); *Schad* v. *Borough of Mount Ephraim*, 49 U.S.L.W. 4597, 4601 (U.S. June 1, 1981).

The attributes of cable broadcasting technology indicate that the nearly absolute strictures against direct[7] governmental regulation of newspapers' dissemination of information cannot

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that the City has taken any affirmative steps toward reserving channels for public access. And regarding interconnection, we do not know what form it will take, or indeed, whether it will, or even can, practicably occur in Boulder. Depending on how, or if at all, these First Amendment issues ripen at trial, the district court will have an opportunity to resolve them with the benefit of a fully-developed factual record.

[7] Nondiscriminatory application of general laws to the business aspects of publishing has been given constitutional approval, even though enforcement may have the *indirect* effect of lessening a publisher's ability to disseminate information. *See, e.g., Citizen Publishing Co.* v. *United States*, 394 U.S. 131, 139 (1969) (antitrust laws); *Associated Press* v *NLRB*, 301 U.S. 103, 130-31 (1937) (labor relations laws).

be applied in wholesale fashion to cable operators. To disseminate information, a newspaper need not use public property in the same way that a cable operator does. A newspaper may reach its audience simply through the public streets or mails, with no more disruption to the public domain than would be caused by the typical pedestrian, motorist, or user of the mails. But a cable operator must lay the means of his medium underground or string it across poles in order to deliver his message. Obviously, this manner of using the public domain entails significant disruption, especially to streets, alleys, and other public ways. Some from of permission from the government must, by necessity, precede such disruptive use of the public domain. We do not see how it could be otherwise.[8] A city needs control over the number of times its citizens must bear the incovenience of having its streets dug up and the best times for it to occur. Thus, government and cable operators are tied in a way that government and newspapers are not.[9]

A second basis for government regulation of cable, and the one directly relied upon by the City in enacting its ordinance, is "medium scarcity." More specifically, the City asserts that there are physical and economic limitations on the number of

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[8] The Federal Communications Commission has written:

"[L]ocal governments are inescapably involved in the [franchising] process because cable makes use of streets and ways and because local authorities are able to bring a special expertness to such matters . . . ."

37 Fed. Reg. 3276 (1972).

[9] Unlike publishing, cable television has been and remains a highly regulated industry. *See generally* Albert, *The Federal and Local Regulation of Cable Television,* 48 Univ. Colo. L. Rev. 501 (1977); Barnett, *State, Federal, and Local Regulation of Cable Television,* 47 Notre Dame Law. 685 (1972); Besen, *The Deregulation of Cable Television,* 44 Law & Contemp. Prob. 77 (1981); Williamson, *Franchise Bidding for Natural Monopolies—in General and With Respect to GATV,* Bell J. Econ. (1976); Comment, *Technology Meets Bureaucracy: the FCC's Policy for Two-Way Television,* 31 Fed. Com. L.J. 413 (1979); Note, *FCC Regulation of Cable Television,* 54 N.Y.U.L. Rev. 204 (1979); Comment, *Regulating CATV: Local Government and the Franchising Process,* 19 S.D. L. Rev. 143 (1974).

cable systems that can practicably operate in a given geographic area. In physical terms, the City alleges a sheer limit on the number of cables that can be strung on existing telephone poles. Economically, the City argues that cable broadcasting is a monopolistic industry because it is not economically viable for more than one cable company to operate in any given geographic area. Together, the City contends, these limitations give cable companies the character of a natural monopoly and thus make the cable broadcasting medium "scarce" in much the same way that the finiteness of the electromagnetic spectrum makes wireless broadcasting a medium of essentially limited access.

Inherent limitations on the number of speakers who can use a medium to communicate has been given as a primary reason why extensive regulation of wireless broadcasting is constitutionally permissible. *See Columbia Broadcasting System, Inc.* v. *Democratic National Committee,* 412 U.S. 94, 101 (1973); *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367, 388 (1969); *National Broadcasting Co.* v. *United States,* 319 U.S. 190, 226 (1943). When such limitations exist, and the medium requires use of a limited and valuable part of the public domain, the government must step in to allocate entry into that medium. In such circumstances, it confuses analysis to say that denying a potential disseminator the right to reach an audience is a prior restraint. No individual disseminator has the constitutional right to be the particular person who obtains the privilege to use the medium. *See Red Lion,* 395 U.S. at 389 (wireless broadcast "license has no constitutional right to be the one who holds the license").

In rejecting the notion of "medium scarcity," the district court preliminarily found that "competition on the poles" among cable operators is possible. *Boulder II,* 496 F.Supp. at 830. It is not clear whether this was a finding that no economic monopoly exists in Boulder, or whether this was only a finding that no physical law really limits the number of cables that can be laid or strung side by side. In any event, relying on *Miami Herald Publishing Co.* v. *Tornillo,* 418 U.S. 241 (1974), the district court rejected economic monopoly as justifying any degree of regulation whatsoever. In *Miami Herald,* notwith-

stanc..g contentions that the nation is dominated by one-newspaper cities and the economic conditions have made new entry into the newspaper industry virtually impossible, the Supreme Court held that a state imposed public right of access to the pages of a newspaper violates the First Amendment. The district court concluded from *Miami Herald* that "scarcity" within the cable broadcasting medium arising from economic conditions could in no way justify regulation of cable operators. *Boulder II*, 496 F.Supp. at 830. *Miami Herald*, however, must be read in context. The Court was writing about newspapers, a communication medium protected by a long-standing and powerful tradition that keeping government's hands off is the best way to achieve the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open . . . ." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964). Moreover, *Miami Herald* involved an effort by state government to compel public access to a medium that is not tied to government in the way cable companies necessarily are. There, the characteristic of economic scarcity was unrelated to a disruptive use of the public domain requiring a government license. The state of Florida simply felt that access to the pages of newspapers was needed to ensure presentation of all differing viewpoints within the marketplace of ideas, and relied upon notions of economic concentration the industry to justify its control upon newspapers. It was in this context that the Court concluded "economic scarcity," without more, could not overcome the First Amendment objection against requiring a private newspaper to print what Florida's right-of-reply statute dictated.

The cable broadcasting medium presents very different circumstances.[10] As already noted, *see* note 9 *supra*, this industry has always been regulated in many respects. There is no tradition of nearly absolute freedom from government control. Most importantly, a cable company must significantly

[10] For an interesting view on partial regulation of the mass media, see Bollinger, *Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media*, 75 Mich. L. Rev. (1976).

impact the public domain in order to operate; without a license, it cannot engage in cable broadcasting to disseminate information. This is exactly opposite of the situation in *Miami Herald.*

If when faced with a request for a license from a cable operator, government reasonably anticipates the kind of "medium scarcity" we have discussed, it must be permitted to deal with the effects of the scarcity that may attend the use of the license it is about to issue. That is, government must have some authority in such a context to see to it that optimum use is made of the cable medium in the public interest. In view of the lengthy franchises that cable operators seem to require, the City's districting ordinance might be justifiable as a means to avoid locking into an outmoded or less than state-of-the-art cable communications system.

The conclusion that natural monopoly is a constitutionally permissible justification for some degree of regulation of cable operators does not mean that the full panoply of principles governing the regulation of wireless broadcasters necessarily applies to cable operators. The general rationale for permitting government regulation may be the same, but the criteria upon which regulatory decisions may be made might differ. As the Supreme Court has stressed, "[e]ach method of communicating ideas is a 'a law unto itself' and that law must reflect the 'differing natures, values, abuses and dangers' of each method." *Metromedia,* 49 U.S.L.W. at 4928 (quoting *Kovacs* v. *Cooper,* 336 U.S. 77, 97 (1949)). For example, differences in (1) the degree of natural monopoly or "scarcity" characterizing the medium, (2) the pace and potential for technological change,[11] or (3) the uses and possible uses of the medium such as two-way cable communications or even interconnection, might make kinds of regulations constitutionally permissible in one medium that would be forbidden in another. But we caution: the power to regulate is not one whit broader than the need that evokes it. Whether that power has been permissibly exercised by the City in this case calls for a particularized

[11] Changes in technology may also alter, over time, the scope of constitutionally permissible regulation within a particular medium.

inquiry into the unique attributes of the cable broadcasting medium. The district court is best suited for such inquiry in the first instance upon a fully developed factual record.

In sum, the significant First Amendment issues create a presumption of irreparable harm on both sides in this case and present a fair ground for litigation for both parties. Each side has moved for preliminary relief. Balancing the hardships, we cannot agree with the district court's essentially one-sided grant of preliminary injunctive relief to CCC. Rather, we believe that relief *pendente lite* must be tailored so as to minimize irreparable harm to both sides and at the same time to permit a meaningful grant of whatever permanent relief may be warranted. *Cf. Taylor Wine Co.* v. *Bully Hill Vineyards, Inc.*, 569 F.2d 731 (2d Cir.), *appeal after remand*, 590 F.2d 701 (1978) (extensive fashioning of preliminary injunctive relief on use of "Taylor" trademark as between Taylor Wine Company and Mr. Walter S. Taylor). *See also Tracy* v. *Salamack*, 572 F.2d 393, 396-97 (2d Cir. 1978); *International Controls Corp.* v. *Vesco*, 490 F.2d 1334, 1347 & n.18 (2d Cir. 1974); *Omega Importing Corp.* v. *Petri-Kine Camera Co.*, 451 F.2d 1190, 1197 (2d Cir. 1971). This is best accomplished by freezing the parties in their present circumstances until trial on the merits, *see* note 2 and accompanying text *supra*, rather than either by allowing CCC to continue its expansion in complete derogation of Ordinance No. 4515, or by permitting the City to strictly enforce the boundaries of its ordinance, which would leave the City free to grant exclusive cable franchises outside those boundaries.

Taking into consideration the concepts we have outlined in this opinion, the task for the district court at trial is to determine, upon final fact findings, whether cable's unique attributes warrant, in First Amendment terms, the nature and extent of regulation the City seeks to impose on cable companies in Boulder. In so doing, the district judge must fashion the First Amendment standards to be applied to this new medium under the circumstances of this case.

Reversed and remanded for trial on the merits.

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FILED
JUN 26 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1350

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1980

COMMUNITY COMMUNICATIONS COMPANY, INC.,
Petitioner,

vs.

CITY OF BOULDER, COLORADO,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

AMICI CURIAE BRIEF FOR THE CITY OF AKRON, OHIO AND THE OHIO WATER DEVELOPMENT AUTHORITY

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No. 80-1350

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1980

COMMUNITY COMMUNICATIONS COMPANY, INC.,
Petitioner,

vs.

CITY OF BOULDER, COLORADO,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

AMICI CURIARE BRIEF FOR THE CITY OF AKRON, OHIO AND THE OHIO WATER DEVELOPMENT AUTHORITY

INTEREST OF AMICI CURIAE

The City of Akron, a home-rule municipality in Ohio, and the Ohio Water Development Authority (OWDA), a state agency

created inter alia to assist in financing solid-waste disposal systems, join in this brief as amici curiae in support of Respondent. These amici also adopt the brief filed herein by Respondent.

In addition to their general interest in conducting their governmental affairs free of fear that their actions may be challenged as antitrust violations, these amici are also interested in this case because they are presently subjected to antitrust litigation arising from their allegedly illegal, inter-government agreement. That agreement was part of a financing relationship between Akron and OWDA for the purpose of constructing a new resource recovery solid-waste disposal system built in Akron and financed through the OWDA. Specifically, Akron agreed with OWDA that it would adopt an ordinance requiring that all solid waste collected

within the city limits be taken to the new facility. OWDA insisted upon adoption of this ordinance to insure that all of Akron's solid waste would be disposed of in an environmentally sound manner and to insure adequate utilization of the facility to serve the revenue bonds OWDA issued to finance the project. After the ordinance was adopted, certain landfill operators and solid waste haulers sued Akron and OWDA asserting, inter alia, that the ordinance imposed an anticompetitive restraint upon the business of collecting and disposing of solid waste and constituted an attempt to monopolize that business, all in violation of Sections 1 and 2 of the Sherman Act. After trial on the merits, the District Court rejected plaintiffs' antitrust claims on the ground, inter alia, that the people of Ohio, through the home rule provisions of the Ohio Constitution, had allocated the

power to regulate the collection and disposal of solid waste within a city's corporate limits to the city's council, not the state legislature; that accordingly the Akron council, in adopting the ordinance, stood in the same position and exercised the same sovereign power as the state legislature exercises in those areas to which the people of Ohio have allocated it power to legislate; and that therefore, the ordinance was immune from antitrust attack under Parker v. Brown, 317 U.S. 341 (1943); Glenwillow Landfill, Inc. v. City of Akron, 385 F.Supp. 671 (N.D. Ohio 1979). The case has been appealed and was argued to the Sixth Circuit Court of Appeals in October, 1980, sub nom. Hybud Equipment Corp. v. City of Akron, No. 80-3121 (6th Cir. Jan. 14, 1980). No decision has yet been rendered, presumably due to the pendency of the instant appeal before this Court.

Although the issues before the Sixth Circuit are not identical to those presented here, these amici find themselves in much the same position as the City of Boulder - having to defend an antitrust lawsuit attacking a governmental action well within the scope of the home-rule power granted a municipality by the people.

The ability of local government to solve the problems of urban communities is already strained because of the limited sources of funds available to meet the increasing demands for government services in our society. To apply the Sherman and Clayton Acts to exercises of home-rule power by municipalities - and thus create another obstacle to local government's attempts to fulfill the needs of an urban citizenry - would be exceedingly unwise.

It is this interest in maintaining their ability to address present-day urban

problems, expecially in the area of providing solid-waste removal systems, that prompts these amici to file this brief and to join in respondent's brief.

SUMMARY OF ARGUMENT

Applying federal antitrust statutes to governmental actions by local governments under their home-rule power will unduly interfere with the accomplishment of important social goals, e.g., environmental goals, as is illustrated by these amici's own situation.

ARGUMENT

These amici support the arguments contained in respondent's brief. For those reasons, the federal antitrust statutes should be read as not reaching actions taken by local governments under sovereign, home-rule power vested in them by the people. In addition, these amici will offer as an example a description of one area of

local government where the risk of antitrust litigation would impede efforts to accomplish vital societal goals. That area is the traditional one of collecting and disposing of garbage, trash and other refuse.

In the past decade, Congress has enacted numerous laws designed to improve the nation's environment.1/ Most of these statutes apply with equal, if not greater, force to municipalities as to industry. For instance, Congress has decided to utilize existing municipal sewage treatment plants as a primary tool in clensing the waters of the United States of industrial as well as residential waste.2/ These more strict

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1/ Clean Air Act, 42 U.S.C. § 7401 et seq.; Clean Water Act, 33 U.S.C § 1251 et seq.; Resource Conservation and Recovery Act, 42 U.S.C. § 6901 et seq.; Toxic Substances Control Act, 15 U.S.C. § 2601 et seq.; Safe Drinking Water Act, 42 U.S.C. § 300F et seq.

2/ See 33 U.S.C. §§1251(a)(4), 1281(c) and (e) and 1317 (b) and (c).

environmental requirements have greatly increased the traditional burden on the nation's local governments to provide waste removal systems. Merely hauling trash to any open landfill to be burned or buried is no longer enough.3/ A more environmentally acceptable method of disposal is necessary.

Akron, like cities throughout Ohio and the nation, faces the challenge of disposing of waste in accordance with these new environmental regulations. In meeting the challenge, Akron, as a charter municipality, can use its home-rule power under the Ohio Constitution. Home-rule is granted to municipalities in Ohio by the following constitutional provision:

> "Municipalities shall have authority to exercise all powers of self-government and to adopt and enforce within their limits, such local police, sanitary and

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3/ See Resource Conservation and Recovery Act, 42 U.S.C. § 6945(c): ". . . open dumping of solid wastes or hazardous waste is prohibited . . ."

other other similar regulations as are not in conflict with the general laws."4/

Akron may also call upon the OWDA for assistance in financing capital improvements to dispose of waste without degrading the environment. The OWDA's very existence is a response tc the financial needs in meeting these new environmental requirements through the construction of new disposal or treatment systems.5/

A discussion of Akron's solid-waste program will illustrate the need for what in the private sector might be circumscribed by the antitrust laws. The intergovernmental cooperation between OWDA and Akron, which is allegedly a combination in restraint of trade, is only one example of the relationships and restrictions that are needed,

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4/ Ohio Const. Art. IVIII, Sec. 3 (Page's 1979).

5/ Ohio Rev. Code Ann. §§ 6121.03 and 6123.03 (Page's 1977).

especially in the environmental area, to deal economically, safely and effectively with the many present day problems that beset local government.

In the early 1970's Akron's officials foresaw an impending solid waste disposal crisis principally triggered by (a) Ohio's new stringent solid waste disposal regulations which placed substantial constraints on the future location and operation of waste disposal sites, and (b) the fast diminishing capacity of existing landfill sites in the Akron area.

In response, Akron undertook extensive studies of alternative, long-range solutions including sanitary landfill, incineration, composting, rail haul to abandoned strip mines, size and volume reduction mehtods (shredding, crushing, etc.), and resource recovery techniques. Akron concluded that a recycle energy system (RES), designed with

the latest technology to incinerate solid waste to produce marketable steam or electricity, was the best long-range solution to the solid waste disposal problem for a number of reasons, including the facts that:

1. An RES could be centrally located within the corporate limits, thereby obviating costly hauling and assuring that Akron retained control over the facility;

2. The ash residue produced by the RES could be used for fill or safely landfilled requiring the utilization of far less land than ordinary landfilling.

3. Incineration would markedly reduce the pollution and nuisances associated with landfills and, to the extent it replaced coal fire burners, would actually reduce air pollution.

4. The costs of operation could be offset by the sale of steam or electricity and recyclable materials as well as the collection of a disposal charge.

A significant factor in Akron's decision was the fact that its only landfill generated continuing problems, controversy and litigation. Indeed, in order to settle

pending litigation, Akron had been forced to agree to cease operating its landfill no later than December 1977.

During the first half of 1975, Akron attempted to finance the proposed RES on its own through the sale of revenue bonds, but by mid-1975, it became apparent that Akron's RES revenue bonds would not be marketable due to the novelty of RES technology and the ill effects of the New York City financial crisis on the capital markets. Consequently, Akron asked the OWDA to finance the project.

OWDA is mandated by law to implement "the public policy of the State . . . to provide . . . efficient and proper methods of disposal, salvage and reuse of or recovery of resources from solid waste . . ."6/ To effect its mandate, the Ohio

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6/ Ohio Rev. Code Ann. § 6123.03 (Page's 1977).

General Assembly has vested OWDA with power to finance solid waste projects by issuing revenue bonds, and in conjunction with such projects and their financing, to enter into cooperative agreements with other governmental agencies containing such terms as are necessary to safeguard ". . . the respective interests of the parties thereto . . ."7/

After concluding that Akron's proposed RES would further the state policy OWDA has been mandated to implement, OWDA agreed to finance the project and in July 1976, the investment banking firm of Dillon, Reed & Co. agreed to head an underwriting team to purchase and resell the OWDA's RES bonds. OWDA and its underwriters concluded that in order to market the revenue bonds, it would be necessary to assure the bondholders that

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7/ Ohio Rev. Code Ann. § 6123.13 (Page's 1977).

the RES project would receive an adequate supply of waste in order to provide adequate revenues to repay the bonds; and that to do so, it would be necessary for Akron to exercise its home-rule power to require that all solid waste generated within its limits be taken to the RES facility for disposal. The OWDA also wanted all of Akron's solid waste to be processed through the RES plant, rather than deposited in some landfill, to further its interest in cleaning up the environment.

In October 1976, Akron's City Council authorized a cooperative agreement with OWDA. Section 5.5 I of this agreement provides, among other things, that Akron covenants with OWDA as follows:

> "I. For the term of this Agreement, [Akron] shall require that all collectors and haulers of Solid Waste within [Akron] be licensed by [Akron] and all such licenses shall provide that all collectors or haulers of Solid Waste shall dispose of all Solid Waste generated within the

> corporate limits of [Akron] which is acceptable for disposal by the Project to be deliverd to the Project for disposal through the Project . . . [Akron] will take all available action, administrative, judicial and legislative, to cause all Solid Waste generated within the corporate limits of [Akron] . . . to be delivered to the Project for disposal through the Project."

To fulfill its obligations under this covenant, Akron enacted Ordinance No. 846-1976 which provides, in pertinent part:

> "From and after the date on which [the RES] plant begins accepting rubbish for disposal, all rubbish collected within the corporate limits of the City by the holder of a rubbish haulers license shall be deposited at such plant; . . ."

The ordinance does <u>not</u> apply to source-segregated recyclable materials - i.e., waste paper, cardboard, metals, etc. - segregated for recycling or other use by the preson generating the waste. It only applies to mixed solid waste put out by the generator thereof for disposal.

This ordinance has been challenged on antitrust grounds, among others. Glenwillow Landfill, Inc. v. City of Akron, 485 F. Supp. 671 (N.D. Ohio 1979), appeal docketed sub nom. Hybud Equipment Corp. v. City of Akron, No. 80-3121 (6th Cir. Jan. 14, 1980).

This antitrust attack on the actions of Akron and OWDA was made in spite of federal and Ohio precedents establishing that ordinances monopolizing or otherwise controlling the collection and/or disposal of solid waste within municipalities are proper police power measures that do not violate the Fourteenth Amendment. E.g., California Reduction Co. v. Sanitary Reduction Works, 199 U.S. 306, 319-22 (1905); Gardner v. Michigan, 199 U.S. 325, 332-33 (1905); State, ex rel. Moock v. Cincinnati, 120 Ohio St. 500, 508-09, 166 N.E. 583, 585-86, cert. denied, 280 U.S. 578 (1929); Canton v. Van Voorhis, 61 Ohio App. 419, 421-22, 22

N.E.2d 651, 652, appeal dismissed for want of debatable question, 135 Ohio St. 319, 20 N.E.2d 720 (1939). Moreover, Ohio courts have unequivocally declared that ordinances directing the flow of solid waste to a single hauler or disposal site are proper exercises of the sovereignty granted to municipalities by the home-rule provision of the Ohio Constitution. Moock v. Cincinnati, supra; Canton v. Van Voorhis, supra.

Although the sovereign, home-rule acts of Akron should not have been the subject of antitrust claims, Parker v. Brown, 317 U.S. 341 (1943), such litigation was commenced under the decision in City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978).

These amici do not occupy a unique position. Local governments across the country for many decades have, under local police power, limited the collection or

disposal of rubbish. See, e.g., Silver v. Los Angeles, 217 Cal.App.2d 134, 31 Cal.Rptr. 545, 549-50 (1963); State v. Orr, 68 Conn. 101, 35 A.770, 771 (1896); United Sanitation Services, Inc. v. Tampa, 302 So.2d 435, 436 (Fla.Ct.App. 1974); Strub v. Deerfield, 19 Ill.2d 401, 167 N.E.2d 178, 180 (1960); Indianapolis v. Ryan, 212 Ind. 447, 7 N.E.2d 974, 976 (1937); O'Neal v. Harrison, 96 Kan. 339, 150 P.551 (1915); State v. Robb, 100 Me. 180, 60 A.874, 877 (1905); In re Vandine, 23 Mass. (6 Pick) 187, 17 Am. Dec. 351 (1827); Wheeler v. City of Boston, 233 Mass. 275, 123 N.E. 684, 686 (1919); Grand Rapids v. DeVries, 123 Mich. 570, 82 N.W. 269, 273-74 (1900); Valley Spring Hog Ranch Co. v. Plagman, 282 Mo. 1, 220 S.W.1, 4-5 (1920); Dover Township v. Witt, 7 N.J. Super. 259, 72 A.2d 884, 885 (1950); Marangi Brothers v. Board of Commissioners, 33 N.J. Super. 294, 110 A.2d

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Similarly, municipalities have traditionally enacted mandatory sewer connection ordinances. See, e.g., Hutchison v. Valdosta, 227 U.S. 303 (1912); District of Columbia v. Brooke, 214 U.S. 138, 148 (1909); Hodge v. Stout, 377 F.Supp. 131, 135 (E.D. Tenn. 1974); People v. Butcher, 28 Misc.2d 24, 209 N.Y.S.2d 723, 728 (1960); Brandel v. Lawrenceburg, 249 Ind. 47, 230 N.E.2d 778, 781 (1967); Sikeston v. Sisson, 363 Mo. 104, 249 S.W.2d 345, 346-47 (1952).

As the discussion above demonstrates, municipalities often take governmental action, sometimes in cooperation with other levels of government, which might give rise

to antitrust litigation. A clear pronouncement that local governmental action under home-rule provisions may not give rise to antitrust liability is needed. Without such a clear rule, local governments will be deterred from many actions, rationally designed to promote the public health, safety and welfare, for fear of the enormous costs of antitrust litigation. Requiring cities to run the risk of antitrust suits arising from their governmental actions is an unnecessary additional cost for local governments already at the breaking point. Moreover, the delay which potential antitrust considerations would impose could seriously jeopardize the health and safety of local citizenry in the community facing a need to solve a sewage or solid waste disposal problem. The overall detrimental affect on the health and safety of millions of people throughout the nation cannot be overstated.

CONCLUSION

These amici urge an affirmance for the foregoing reasons. Local governmental actions pursuant to home-rule power allocated to municipalities by the people of a state should be no more subject to antitrust challenge than actions pursuant to other allocations of power to a state's legislature or judiciary.

Respectfully submitted,

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QUESTION PRESENTED

Is the mere exercise of general home rule governing power by municipalities the equivalent of "state" action which is *by itself* sufficient to qualify for federal antitrust immunity?

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INTEREST OF AMICI CURIAE

The twenty-three states listed on the cover join in this brief as *amici curiae* in support of petitioner Community Communications Company, Inc. ("CCC"). Twenty of those states have adopted constitutional provisions authorizing their municipalities to exercise home rule self-governing authority.[1] Similarly, twenty-one of the *amici* states have enacted antitrust legislation to foster competition within their own borders.[2]

The latter enactments constitute legislative determinations that competition will result in lower prices and better goods and services for the residents of those states. *See, e. g., National Society of Professional Engineers v. United States*, 435 U. S. 679, 695 (1978). Such state antitrust statutes are frequently modeled upon, and construed in accordance with federal judicial interpretations of, the

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1 *See* Alas. Const. art. X, sec. 11; Colo. Const. art. XX, secs. 1, 6; Haw. Const. art. VIII, sec. 2; Ill. Const. art. VII, sec. 6; Iowa Const. art. III, sec. 38A; Kan. Const. art. XII, sec. 5; Me. Const. art. VIII; Md. Const. arts. XI-A, XI-E, XI-F; Minn. Const. art. XII, sec. 3; Mo. Const. art. VI, secs. 18 (a)-(s), 19-19 (a); Mont. Const. art. XI, secs. 5-6; Neb. Const. art. XI, secs. 2-5; N. M. Const. art. X, sec. 6; N. Y. Const. art. IX, sec. 2; Ohio Const. art. XVIII, secs. 1-3, 7; Pa. Const. art. IX, sec. 2; R. I. Const. art. of amend. XXVII, secs. 1-7; Tex. Const. art. XI, sec. 5; W. Va. Const. art. VI, sec. 39 (a); Wis. Const. art. XI, sec. 3.

2 *See* Alas. Stat. secs. 45.50.562 *et seq.*; Ark. Stat. Ann. 1979, secs. 70-101 *et seq.*; Colo. Rev. Stat. 1973, secs. 6-4-101 *et seq.*; 6 Del. C. secs. 2101 *et seq.* (1980 Cum. Supp.); Haw. Rev. Stat. 1976, secs. 480-4 *et seq.*; Ill. Ann. Stat. ch. 38, secs. 60-3 *et seq.*; Iowa Code 1979, secs. 553.4 *et seq.*; Kan. Stat. Ann. 1976, secs. 50-101 *et seq.*; Me. Rev. Stat. Ann. secs. 1101 *et seq.*; Md. Com. Law Code Ann. 1975, secs. 11-204 *et seq.* (1980 Cum. Supp.); Minn. Stat. 1980, secs. 3250.51 *et seq.*; Mo. Ann. Stat. secs. 416.031 *et seq.*; Mont. Rev. Codes Ann. 1979, secs. 30-14-205 *et seq.*; Neb. Rev. Stat. 1943, secs. 59-801 *et seq.*; N. M. Stat. Ann. 1978, secs. 57-1-1 *et seq.*; N. Y. Gen. Bus. Law secs. 340 *et seq.* (1980-81 Cum. Supp.); Ohio Rev. Code Ann. secs. 1331.01 *et seq.*; R. I. Gen. Laws 1969, secs. 6-36-4 *et seq.* (1980 Cum. Supp.); Tex. Bus. & Com. Code Ann. tit. 2, sec. 15.04; W. Va. Code 1980, secs. 47-18-3 *et seq.*; Wis. Stat. Ann. secs. 133.03 *et seq.* (1980-81 Cum. Supp.).

Sherman Act.[3] "The Sherman Act [itself] was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade." *Northern Pacific Railway v. United States*, 356 U. S. 1, 4 (1958).

In the case at hand, the Tenth Circuit found the city of Boulder, Colorado, to be exempt from the antitrust laws because of its home rule status. That decision allows virtually every home rule city in the nation, acting solely on its own initiative, to avoid compliance with either federal or state[4] antitrust laws when exercising home rule powers. In effect, the decision elevates local action taken under the guise of municipal self-government to a position of superiority over "[t]he heart of our national economic policy [which] long has been faith in the value of competition." *Standard Oil Co. v. FTC*, 340 U. S. 231, 248 (1951).

In light of the foregoing, the interests of the citizens of the *amici* states in obtaining the benefits of competition have been frustrated by the decision of the court below.

STATEMENT OF THE CASE

Facts

Boulder is a "home rule" city under Colo. Const. art. XX, sec. 6 (App. E to Colo. *amicus curiae* br. for *cert.*). In 1964, acting under its power to regulate public rights-of-way (*see* Colo. Const. art. XX, sec. 1 [App. F to Colo.

3 *See, e. g., Grams v. Boss*, 97 Wis. 2d 332, 346, 294 N. W. 2d 473, 480 (1980); *Marin County Bd. of Realtors v. Palsson*, 130 Cal. Rptr. 1, 549 P. 2d 833 (Sup. Ct. 1976); *Oates v. Eastern Bergen Co.*, 113 N. J. Super. 371, 273 A. 2d 795 (1971); *Pittsburgh Plate Glass Co. v. Paine & Nixon Co.*, 234 N. W. 453 (Minn. 1931).

4 *See, e. g., State v. Milwaukee Braves, Inc.*, 31 Wis. 2d 699, 144 N. W. 2d 1 (1966) (because of federal antitrust exemption, baseball exempt from state antitrust statute interpreted according to Sherman Act).

amicus curiae br. for *cert.*]), Boulder granted to a cable company a 20-year, nonexclusive permit to build a cable t.v. system in the city. Boulder, Colorado, City Ordinance No. 2846 (Oct. 6, 1964) (App. G to Colo. *amicus curiae* br. for *cert.*). In 1966, that firm assigned the permit to petitioner CCC with Boulder's concurrence. Boulder, Colorado, City Resolution No. 7D (July 5, 1966) (J. A. 9).

Since 1966, the cable t.v. system established by CCC has provided service to one area of Boulder, consisting of approximately 20% of the city's residential units. *Community Communications Co. v. City of Boulder*, 485 F. Supp. 1035, 1036 (D. Colo. 1980). The system's programming has consisted of cable retransmission of area broadcast t.v. stations. *Id.*

In May of 1979, CCC announced plans to expand its system by installing cable in other areas of the city. *Id.* at 1037. Shortly thereafter, Boulder Communications Company ("BCC"), another cable t.v. firm, also proposed a cable system for the city. *Id.* The city then hired a consultant and began a review of the cable t.v. situation in the Boulder market. *Id.*

Following that review, Boulder imposed a 3-month moratorium on cable t.v. installation in the city. Boulder, Colorado, City Ordinances No. 4472 (Jan. 1, 1980) and No. 4473 (Dec. 18, 1979) (Apps. H and I, respectively, to Colo. *amicus curiae* br. for *cert.*). The temporary effect of that action was to prohibit CCC from geographically expanding its system beyond the area already served. *Id.* Subsequently, however, Boulder made that limitation permanent. Boulder, Colorado, City Ordinance No. 4515 (July 22, 1980) (App. J to Colo. *amicus curiae* br. for *cert.*).

Course of Proceedings

On January 15, 1980, CCC filed the instant action in federal district court in Denver, Colorado, against Boulder, BCC, and certain principals of BCC. The complaint alleged, *inter alia,* that the defendants had conspired to restrict CCC's expansion of its cable t.v. system within the city in violation of section 1 of the Sherman Act, 15 U. S. C. sec. 1. In defense, Boulder asserted in pertinent part that it was exempt from the federal antitrust laws. The district court, relying on *City of Lafayette v. Louisiana Power & Light Co.,* 435 U. S. 389 (1978), ruled that the city was not so immune. *Community Communications Co. v. City of Boulder,* 485 F. Supp. at 1039.

Upon appeal to the Tenth Circuit, a divided panel of that court reversed. The panel majority distinguished *City of Lafayette* and held that, because of its "home rule" status, action by the city of Boulder is equivalent to action by the State of Colorado for federal antitrust immunity purposes. *Community Communications Co. v. City of Boulder,* 630 F. 2d 704, 708 (10th Cir. 1980).

In dissent, Judge Markey took issue with the conclusions of the panel majority.[5] He was of the view that home rule cities are not to be treated as states even though they may be "sovereigns" within their own borders. *Id.* at 717. He reasoned that the so-called state action "exemption" is founded on the dual federal-state system of sovereignty and does not envision "city-states." *Id.* Accordingly, he believed that home rule cities do not have the absolute antitrust immunity accorded them by the panel majority. *Id.* at 711 n. 2, 717, 718, 719.

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5 Judge Markey, Chief Judge of the United States Court of Customs and Patent Appeals (sitting by designation), dissented on both antitrust and first amendment grounds. *See generally* 630 F. 2d at 709-20.

The case is now before this Court pursuant to CCC's petition for a writ of *certiorari*. That petition was granted and writ issued in accordance with an order of this Court dated April 6, 1981.

SUMMARY OF ARGUMENT

In reaching its decision, the Tenth Circuit erred in several significant ways. First, in direct rejection of *City of Lafayette*, that court conferred virtually blanket antitrust immunity on thousands of home rule cities across the country, a result likely to have a severely disruptive effect on the operation of the nation's economic system. Additionally, the appellate court attempted to distinguish *City of Lafayette* on the unfounded basis that it is applicable only to "proprietary" activity. Moreover, the Tenth Circuit ignored the thrust of recent Supreme Court decisions significantly limiting the ability of governmental entities to claim state action immunity for their activities. Furthermore, the court rejected the *Lafayette* requirement that the state must authorize the particular kind of anticompetitive activity engaged in by the city. Finally, the appellate court concluded that the policy and supervision of the city itself could take the place of the necessary state policy and supervision. On each such point, the decision of the Tenth Circuit contravenes prior decisions of this Court.

ARGUMENT

I. THE TENTH CIRCUIT'S DECISION DISREGARDS THE TEACHING OF THE SUPREME COURT IN CITY OF LAFAYETTE WITH RESPECT TO THE ANTITRUST IMMUNITY STATUS OF CITIES.

In the seminal case of *City of Lafayette v. Louisiana Power & Light Co.*, 435 U. S. 389 (1978), this Court expressly ruled that cities are subject to the federal anti-

trust laws and that they are not given the same federal deference as the states which create them. In the case at hand, the Tenth Circuit has exempted home rule cities from that holding, with potentially disastrous consequences for the "overarching and fundamental policies . . ." established by the antitrust laws. *Id.* at 399.

A. The Tenth Circuit's decision granting virtually absolute antitrust immunity to home rule cities, and the anticompetitive consequences which will necessarily result therefrom, directly contravene the majority holding and rationale in City of Lafayette.

In this case the Tenth Circuit held that the city of Boulder, Colorado, has state action immunity from the antitrust laws when acting on its own in the exercise of its general home rule self-governing powers. *See* 630 F. 2d at 708. In essence, the appellate court ruled that home rule cities stand in the shoes of the state for purposes of federal antitrust immunity analysis. *See id.*

The Tenth Circuit's decision has potentially enormous precedential significance nationwide. Within the Tenth Circuit alone, all six states have constitutional home rule provisions,[6] with at least 851 home rule municipalities operating thereunder.[7] Some 34 states in the other ten circuits across the nation also have constitutional provisions authorizing municipal home rule,[8] and thousands more such cities undoubtedly exist in those states.

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6 *See* Colo. Const. art. XX, secs. 1 and 6; Kan. Const. art. XII, sec. 5; N. M. Const. art. X, sec. 6; Okla. Const. art. XVIII, sec. 3 (a); Utah Const. art. XI, sec. 5; Wyo. Const. art. XIII, sec. 1.

7 *See* Lists of Home Rule Municipalities in Colorado (56 cities), Oklahoma (79 cities), and Wyoming (90 cities) (Apps. B, C, and D, respectively, to Colo. *amicus curiae* br. for *cert.*), and League of Kansas Municipalities, Information for Kansas Officials at 7-12 (1979) (626 home rule cities).

8 *See* Vanlandingham, *Constitutional-Municipal Home Rule Since the AMA (NLC) Model*, 17 Wm. & Mary L. Rev. 1, 4 n. 9 (1975).

Some states, like Colorado and Oklahoma within the Tenth Circuit, are empowered on purely local matters to enact ordinances superseding conflicting state laws.[9] The effect of the Tenth Circuit's decision is to ensure the virtually absolute antitrust immunity of cities in those states whenever they exercise their home rule powers in even arguably appropriate subject-matter areas. *See, e. g., Community Communications Co. v. City of Boulder*, 630 F. 2d at 711 n. 2 (Markey, C. J., dissenting) (The Tenth Circuit's decision results in "absolute immunity of [all 56 constitutional home rule] Colorado cities from the Sherman Act."). The decision has the same effect in many other of those states, similar to Kansas and Wyoming in the Tenth Circuit, in situations like the instant one where home rule ordinances do not conflict with state statutes and the cities therefore have the same power over the particular subject area as do the state legislatures.[10]

If allowed to stand, then, the Tenth Circuit's ruling will result in many thousands of home rule cities across the nation being free to act individually in defiance of the antitrust laws. The creation of such blanket antitrust immunity, and the resultant interference with the fundamental national economic policy of competition, are in direct conflict with principles set forth in *City of Lafayette*.

In *Lafayette*, a majority of this Court, noting that there exists a heavy presumption against implied exclu-

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9 *See, e. g., VFW Post 4264 v. City of Steamboat Springs*, 195 Colo. 44, 575 P. 2d 835 (1978); *Lee v. Norick*, 447 P. 2d 1015 (Okla. 1968).

10 *See, e. g., Garten Enterprises v. City of Kansas City*, 219 Kan. 620, 549 P. 2d 864 (1976). *Cf. Tri-County Elec. Ass'n v. City of Gillette*, 584 P. 2d 995 (Wyo. 1978) (legislature has power over municipal corporations except as provided in constitutional home rule provision).

sion from the coverage of the antitrust laws, 435 U.S. at 398, rejected the contention that the Sherman Act was not intended to apply to local governments. *See id.* at 394, 408. Contrary to the decision of the Tenth Circuit, in *City of Lafayette* this Court ruled in effect that "'A subordinate state governmental body is not *ipso facto* exempt from the operation of the antitrust laws.'" *Id.* at 393 (citation omitted).

The basis for the Supreme Court majority's determination in this regard was the dual federal-state system of sovereignty in this country, *id.* at 400, coupled with the existence of almost 40,000 local government units nationwide[11] having "broad authority for general governance . . . ." *Id.* at 407-08 (footnote omitted). The *Lafayette* majority was concerned that serious impairment of the national economic policy established by the anti-trust laws would occur if those local governmental units were free to make their own economic choices without regard for the ensuing anticompetitive effects, *id.* at 408, the very result which the Tenth Circuit's decision assures.

B. The Tenth Circuit's decision conferring on home rule cities the status of states runs directly counter to the plurality ruling in City of Lafayette.

In the instant case the Tenth Circuit ruled that the actions and policies of home rule cities are sufficient, in and of themselves and without the necessity for any corresponding state policy, to meet the requisites for state action immunity. *See* 630 F. 2d at 708. Thus, it held in effect that home rule cities occupy a unique status

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11 There were 38,726 counties, municipalities and townships in this country as of 1977, the most recent year for which figures are currently available. *See* 1 United States Bureau of the Census, 1977 Census of Governments, Governmental Organization, at 1 (1977).

equivalent to states for antitrust immunity purposes. In so concluding, the Tenth Circuit refused to follow the guidance provided by a plurality of this Court in *City of Lafayette*. That refusal was erroneous because the *Lafayette* plurality opinion has been cited as controlling precedent by the most recent Supreme Court state action immunity decision,[12] as well as by virtually every post-*Lafayette* lower federal court case finding state action immunity for a subordinate governmental entity.[13]

In *City of Lafayette*, a four-justice plurality of this Court expressly addressed the contention that a state's political subdivisions are to be treated as the equals of the state itself for antitrust immunity purposes. *See* 435 U. S. at 408. The *Lafayette* plurality emphatically rejected the "equivalency" assertion, stating that "a subordinate governmental unit's claim to *Parker* immunity is not as readily established as the same claim by a state

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12 *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U. S. 97, 105 (1980). *See New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 439 U. S. 96, 109 (1978).

13 *See, e. g., Princeton Community Phone Book, Inc. v. Bate*, 582 F. 2d 706, 717, 719-20 (3d Cir.), *cert. denied*, 439 U. S. 966 (1978); *Pueblo Aircraft Serv., Inc. v. City of Pubelo*, 498 F. Supp. 1205, 1209 (D. Colo.), *appeal docketed*, No. 80-2083 (10th Cir. Oct. 16, 1980); *Highfield Water Co. v. Public Serv. Comm'n*, 488 F. Supp. 1176, 1190 (D. Md. 1980); *Glenwillow Landfill, Inc. v. City of Akron*, 485 F. Supp. 671, 677 (N. D. Ohio 1979), *appeal docketed sub nom. Hybud Equipment Corp. v. City of Akron*, No. 80-3121 (6th Cir. Jan. 14, 1980); *Caribe Trailer Systems, Inc. v. Puerto Rico Maritime Shipping Authority*, 475 F. Supp. 711, 721 (D. D. C. 1979), *aff'd mem.*, No. 79-1658 (D. C. Cir. July 3, 1980), *cert. denied*, 101 S. Ct. 1355 (1981); *Shrader v. Horton*, 471 F. Supp. 1236, 1241-42 (W. D. Va. 1979), *aff'd per curiam*, 626 F. 2d 1163 (4th Cir. 1980); *City of Mishawaka v. American Elec. Power Co.*, 465 F. Supp. 1320, 1347 (N. D. Ind. 1979), *aff'd in part, rev'd in part*, 616 F. 2d 976 (7th Cir.), *cert. denied*, 101 S. Ct. 65 (1981); *Cedar-Riverside Assocs. v. United States*, 459 F. Supp. 1290, 1298 (D. Minn. 1978), *aff'd on other grounds sub nom. Cedar-Riverside Assocs. v. City of Minneapolis*, 606 F. 2d 254 (8th Cir. 1979).

government sued as such . . . ." *Id.* at 415. Of particular adverse import for home rule cities was the plurality's dismissal of the argument that action taken by a city when it is exercising the sovereign power of the state *necessarily* reflects state policy and *must* therefore qualify for immunity. *Id.* at 413-14.

In brief, the *Lafayette* plurality ruled that antitrust immunity for a state's subdivisions, such as its cities, extends only to "anticompetitive conduct engaged in as an act of government by the *State*['s] . . . *subdivisions*, pursuant to *state policy to displace competition* . . . ." *Id.* at 413 (emphasis added). Thus, the plurality recognized a dichotomy between the *actions* of the *state's subdivisions*, such as its cities, and the *competition-displacement policy* of the *state itself*. The former are expressly insufficient to achieve antitrust immunity on their own; they may do so only when undertaken pursuant to the latter.

The rationale advanced by the *Lafayette* plurality was that state action immunity derives from the dual federal-state system of sovereignty, but municipalities are not in and of themselves sovereigns under that system,[14] *id.* at 412, a view contrary to that expressed by the Tenth Circuit. In support for its conclusion in this regard, the plurality specifically noted that cities are not treated as the equivalents of states. *Id.* at 412. Rather, they are merely instrumentalities of the state for administering government within the city limits. *Id.* at 413.

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14 On the state action continuum cities fall between states, which more easily qualify for immunity, and private entities, which have a more difficult time doing so. *See Highfield Water Co. v. Public Serv. Comm'n*, 488 F. Supp. at 1189, 1190; *United States v. Southern Motor Carriers Rate Conference*, 467 F. Supp. 471, 484 (N. D. Ga. 1979), *appeal docketed*, No. 79-3741 (5th Cir. Nov. 15, 1979).

Of additional significance to the plurality was the fact that municipalities have substantially less than statewide jurisdiction. Accordingly, if left free to make their own economic decisions the anticompetitive policies adopted by cities could reflect varying individual choices rather than one consistent state policy, *id.* at 414, the exact effect guaranteed by the Tenth Circuit's ruling.

C. The teaching of City of Lafayette is applicable to municipalities even when they possess home rule powers.

1. The rationale on which City of Lafayette is based logically extends to home rule cities.

Home rule municipalities were not excepted by the *Lafayette* majority from its reasoning and conclusion, and logically may not be. The majority's holding was predicated in large part on concern over the potential posed by cities for disruption of the national "regime of competition [which is] . . . the fundamental principle governing commerce in this country." 435 U. S. at 398. That disruptive potential is significantly heightened by the possession of home rule self-governing authority because such power affords municipalities broader latitude than usual for their actions. Thus, the *Lafayette* majority's rationale is even more applicable to home rule cities than to nonhome rule cities.

Moreover, the *Lafayette* majority expressly indicated that its rationale applied to all forms of subordinate governmental units, however constituted. The majority noted that its concern was with the large number of such entities possessing broad general governing authority "subject to limitations *in one way or another* imposed by the State." *Id.* at 408 (emphasis added). In this regard, it is significant that even broad home rule powers such as those in Colorado ultimately are subject to such state-imposed limits. *See, e. g.*, Colo. Const. art. XX, sec. 6, and *City*

of Denver v. Sweet, 138 Colo. 41, 329 P. 2d 441 (1958) (full right of home rule self-government applies *only* to matters of purely local and municipal concern).

Additionally, home rule cities were not excepted by the *Lafayette* plurality from its reasoning and conclusion, and logically may not be. The plurality's ruling was premised on the dual federal-state system of sovereignty in this country and the corresponding necessity for one consistent policy within a state relative to the displacement of competition in a particular subject-matter area. The breadth of a municipality's powers within its own boundaries is a matter irrelevant to that *dual* system of sovereignty. Moreover, the broader a city's powers are, the more freedom the city has to act in a way antithetical to a cohesive state competition-displacement policy. Consequently, the *Lafayette* plurality's reasoning extends of its own force to home rule cities.

In light of the foregoing, the teaching of *City of Lafayette* that cities are not equivalent to states for antitrust immunity purposes is as applicable to home rule cities as it is to non-home rule cities. The holdings in two well-reasoned lower federal court decisions confirm this conclusion.

2. The only lower federal courts which have considered the Lafayette rationale in a home rule context have found City of Lafayette to be applicable to home rule cities.

In the leading case on point, *Woolen v. Surtran Taxicabs, Inc.*, 461 F. Supp. 1025 (N. D. Tex. 1978), Judge Higginbotham expressly rejected the contention that a constitutional home rule municipality whose powers flow directly from the state constitution should be regarded as a sovereign equivalent to the state itself. *Id.* at 1032. The judge found that argument to "stumble upon" the

reasoning of the Supreme Court majority in *City of Lafayette*. *Id.* Accordingly, Judge Higginbotham concluded that however sovereign home rule cities may be as a matter of state law, "[t]hey nonetheless carry the status of municipalities [rather than states] so far as federalism is concerned."[15] *Id.*

Judge Higginbotham's conclusion in *Surtran*, grounded as it is in the rationale of the *Lafayette* majority, lays to rest the contention of the Tenth Circuit that home rule powers in Colorado, because of their supposed breadth, are to be treated differently than home rule powers in other states. *See* 630 F. 2d at 706-07. Further support for Judge Higginbotham's conclusion is found in *In re Airport Car Rental Antitrust Litigation*, 474 F. Supp. 1072 (N. D. Cal. 1979). There the court, "applying the *City of Lafayette* analysis," *id.* at 1096, expressly relied on the *Lafayette* majority's rationale, *id.* at 1088, and found Colorado cities not to have state action immunity from the antitrust laws when exercising their broad home rule powers under Colo. Const. art. XX, sec. 1.

In view of all of the foregoing, it is not surprising that only one court outside the Tenth Circuit has found a home rule municipality to have state action immunity.[16] *See Glenwillow Landfill, Inc. v. City of Akron*, 485 F.

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15 Similarly, the court in *Mason City Center Assocs. v. City of Mason City*, 468 F. Supp. 737 (N. D. Iowa 1979), expressly noted that its analytical reliance on *Lafayette*, which included reference to the majority's rationale, *id.* at 743, would be unchanged regardless of the existence of home rule powers. *Id.* at 744 n. 8.

16 The most recent municipal home rule state action immunity case is from the Tenth Circuit and merely follows the holding in the instant case. *See Pueblo Aircraft Serv., Inc. v. City of Pueblo*, 498 F. Supp. at 1210 (the exercise of municipal policy by a Colorado home rule city is the equivalent of state action and so qualifies for antitrust immunity).

Supp. 671 (N. D. Ohio 1979), *appeal docketed sub nom. Hybud Equipment Corp. v. City of Akron,* No. 80-3121 (6th Cir. Jan. 14, 1980). Moreover, in that case, unlike the instant situation, the state had enacted a comprehensive policy governing the particular subject-matter area in question and had created an agency to supervise the manner in which that policy was implemented by, *inter alia,* home rule cities. *Id.* at 675-77. Additionally, the state appellate courts had previously recognized that Ohio cities are authorized to engage in the particular type of anticompetitive activity which was there at issue. *Id.* at 677. Because of the existence of those factors, which are not present in the case at hand, *Glenwillow Landfill* is inapposite here.[17]

Thus, every court outside the Tenth Circuit which has considered the question has found that the mere existence of municipal home rule powers does not make a difference with respect to antitrust immunity. Contrary to the view of the Tenth Circuit, the *Airport Car Rental* court expressly found that the breadth of a particular Colorado home rule provision likewise makes no difference in that regard. Rather, it is the dual system of sovereignty embodied in the concept of federalism, and the fact that municipalities are not sovereign states, which is determinative. *See City of Lafayette v. Louisiana Power & Light Co.,* 435 U. S. at 412-13; *In re Airport Car Rental Antitrust Litigation,* 474 F. Supp. at 1088; *Woolen v. Surtran Taxicabs, Inc.,* 461 F. Supp. at 1032.

Moreover, any conclusion other than the preceding leads to the situation presently existing in the Tenth Cir-

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17 Significantly, all three courts finding home rule municipalities to have state action immunity (in the instant case and in the *Pueblo Aircraft* and *Glenwillow Landfill* cases) completely ignored the rationale of both the majority and the plurality of the Supreme Court in *City of Lafayette.*

cuit, where antitrust immunity depends solely on whether a local government unit possesses home rule powers under state law, rather than on whether that entity meets the federal standards for immunity identified by this Court in *City of Lafayette*. In such situation, two types of anomalous consequences ensue. First, conflicting immunity results occur between home rule and non-home rule cities in the same state.[18] Second, opposite immunity results occur between home rule and non-home rule cities with respect to the same activity.[19] Yet, it is the challenged activity rather than the status of the city involved which is the proper focus for state action immunity analysis. *See City of Lafayette v. Louisiana Power & Light Co.*, 435 U. S. at 420 (Burger, C. J., concurring). *Accord, Cantor v. Detroit Edison Co.*, 428 U. S. 579, 604 (1976) (Burger, C. J., concurring). Consequently, the approach taken by the Tenth Circuit is erroneous.

II. THE TENTH CIRCUIT'S ATTEMPT TO DISTINGUISH CITY OF LAFAYETTE ON THE GROUND THAT IT IS APPLICABLE ONLY TO SO-CALLED "PROPRIETARY" ACTIVITY IS UNFOUNDED.

As explained above, the precedential impact of *City of Lafayette* on the case at hand is not at all diminished by the fact that Boulder is a home rule municipality while

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18 *Compare Pueblo Aircraft Serv., Inc. v. City of Pueblo*, 498 F. Supp. 1205 (D. Colo.), *appeal docketed*, No. 80-2083 (10th Cir. Oct. 16, 1980) (Colorado home rule city immune), *with Stauffer v. Town of Grand Lake*, 987 Antitrust & Trade Reg. Rep. (BNA) A-9 (D. Colo. Oct. 9, 1980), *appeal docketed*, No. 80-2332 (10th Cir. Dec. 19, 1980) (non-home rule Colorado city not immune).

19 *Compare Pueblo Aircraft Serv., Inc. v. City of Pueblo* (home rule city's ownership and operation of municipal airport immune), *with Guthrie v. Genesee County*, 494 F. Supp. 950 (W. D. N. Y. 1980), *and Pinehurst Airlines, Inc. v. Resort Air Servs., Inc.*, 476 F. Supp. 543 (M. D. N. C. 1979) (non-home rule cities not immune in connection with ownership and operation of municipal airports).

the cities of Lafayette and Plaquemine, Louisiana, were not. Similarly, *City of Lafayette* may not be distinguished on the basis proferred by the Tenth Circuit that it involved "proprietary" activity, which supposedly does not qualify for immunity, while Boulder's action is "governmental," and therefore does so qualify. *See* 630 F. 2d at 708.

For one thing, two policy reasons militate against use of the proprietary-governmental distinction employed by the Tenth Circuit. First, such an analytical approach would lead to further anomalous immunity results. Even though the anticompetitive effects could be exactly the same, a city such as Boulder would not have antitrust immunity if it operated its own cable t.v. system but would be exempt if it simply allowed a private entity to operate the system in exactly the same way under regulation by the city. *See City of Lafayette v. Louisiana Power & Light Co.*, 435 U. S. at 432-33 (Stewart, J., dissenting). Second, the wide range of services provided by governments in this day and age makes it almost impossible to determine what constitutes "proprietary" activity. *Id.* at 433-34 (Stewart, J., dissenting). Indeed, virtually any and all action by governments can subjectively be labeled "governmental." *Community Communications Co. v. City of Boulder*, 630 F. 2d at 717 (Markey, C. J., dissenting).

Additionally, *City of Lafayette* itself does not support the existence of the proprietary-governmental distinction utilized by the Tenth Circuit. Only one Supreme Court Justice even arguably could be said to have employed such an analytical approach in *Lafayette*. Moreover, what Chief Justice Burger actually did there was far less; he merely characterized the particular activity at issue *in that case* as being *in fact* proprietary in nature.

See generally 435 U. S. at 418-26 (Burger, C. J., concurring).

The foregoing analysis is borne out by an examination of the two state action immunity cases decided by this Court subsequent to *City of Lafayette*. Perhaps because of the policy considerations set forth above, neither Chief Justice Burger nor any other member of the Court there made any mention of a supposed proprietary-governmental distinction. *See California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U. S. 97 (1980); *New Motor Vehicle Board v. Orrin W. Fox Co.*, 439 U. S. 96 (1978).

Moreover, both of those decisions involved what subjectively could be characterized as purely "governmental" activity: the regulation by governmental agencies of distribution schemes pertaining to certain products (wine in *Midcal* and automobiles in *Fox*). Nevertheless, immunity was found to exist for the supposedly "governmental" activity in the one case (*Fox*) while it was not in the other (*Midcal*). If the proprietary-governmental distinction envisioned by the Tenth Circuit did in fact exist, both decisions should have resulted in a finding of immunity.

Midcal and *Fox* make clear, then, that the mere susceptibility of an activity to subjective categorization as "governmental" does not qualify it for state action immunity. Rather, it is the meeting of the case law-established requisites which entitles a particular activity to such immunity. *See* 445 U. S. at 105; 439 U. S. at 109. Simply put, then, any subjective classification of activity as "proprietary" or "governmental" in nature is meaningless for purposes of antitrust immunity analysis.

The vast majority of the lower court state action immunity cases support the foregoing analysis. As in *Mid-*

cal, several cases involving powers which could be classified as "governmental"—such as zoning,[20] regulating the practice of medicine or accounting[21] or the provision of ferry services,[22] or licensing liquor-serving establishments[23] —have resulted in a finding of no antitrust immunity. On the other hand, several cases involving the provision of "commercial" type services similar to those involved in *City of Lafayette* have nonetheless resulted in immunity.[24] Moreover, most post-*Lafayette* decisions have either expressly rejected[25] or simply not utilized such a distinction.[26]

In view of the foregoing, it is not surprising that apparently only two courts outside the Tenth Circuit have both utilized a proprietary-governmental distinction and found antitrust immunity for a governmental entity. *See Shrader v. Horton*, 471 F. Supp. 1236, 1242 (W. D. Va. 1979), *aff'd per curiam*, 626 F. 2d 1163 (4th Cir. 1980);

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20 *Whitworth v. Perkins*, 559 F. 2d 378 (5th Cir. 1977), *vacated and remanded sub nom. City of Impact v. Whitworth*, 435 U. S. 992, *reinstated on remand*, 576 F. 2d 696 (1978), *cert. denied*, 440 U. S. 911 (1979); *Stauffer v. Town of Grand Lake*, 987 Antitrust & Trade Reg. Rep. (BNA) A-9 (D. Colo. Oct. 9, 1980), *appeal docketed*, No. 80-2332 (10th Cir. Dec. 19, 1980); *Mason City Center Assocs. v. City of Mason City*, 468 F. Supp. 737 (N. D. Iowa 1979).

21 *Feminist Women's Health Center v. Mohammad*, 586 F. 2d 530 (5th Cir. 1978), *cert. denied*, 444 U. S. 924 (1979); *United States v. Texas State Bd. of Pub. Accountancy*, 464 F. Supp. 400 (W. D. Tex. 1978), *aff'd per curiam*, 592 F. 2d 919 (5th Cir.), *cert. denied*, 444 U. S. 925 (1979).

22 *Corey v. Look*, 641 F. 2d 32 (1st Cir. 1981).

23 *Grendel's Den, Inc. v. Goodwin*, 5 Trade Reg. Rep. (CCH) ¶ 63, 978 (1st Cir. May 4, 1981).

24 *E. g., Highfield Water Co. v. Public Serv. Comm'n*, 488 F. Supp. at 1179-81 (operation of water system); *Glenwillow Landfill, Inc. v. City of Akron*, 485 F. Supp. at 673-74 (operation of solid waste disposal facility); *City of Mishawaka v. American Elec. Power Co.*, 465 F. Supp. at 1346-47 (operation of electric, water and sewer services).

25 *Pinehurst Airlines, Inc. v. Resort Air Servs., Inc.*, 476 F. Supp. 543, 552 (M. D. N. C. 1979).

26 *See, e. g.*, cases cited at nn. 20-24 *supra*.

Cedar-Riverside Associates v. United States, 459 F. Supp. 1290, 1298-99 (D. Minn. 1978), *aff'd on other grounds sub nom. Cedar-Riverside Associates v. City of Minneapolis*, 606 F. 2d 254 (8th Cir. 1979). Moreover, the courts in those two cases relied on the supposed distinction as only one factor among many in their overall state action analyses. Further, like the *Glenwillow Landfill* decision discussed above, both cases involved the existence of a comprehensive state policy to displace competition and a state agency with supervisory authority over such policy and so are inapposite here. *See* 471 F. Supp. at 1237-38; 459 F. Supp. at 1291-93, 1298.

In light of the foregoing, even if Boulder's regulation of cable t.v. subjectively may be classified as "governmental," that does not assure it of antitrust immunity. In any event, however, the activity here involved can best be characterized as proprietary in nature. Thus, even assuming *arguendo* that *City of Lafayette* applies only to proprietary activity, it still governs the instant case.

Simply put, Boulder's cable t.v. ordinances are contracts which represent a proprietary interest. *Community Communications Co. v. City of Boulder*, 630 F. 2d at 719 (Markey, C. J., dissenting). In fact, Boulder's involvement with cable t.v. is explicitly a profit-making venture; under its existing arrangement with CCC the city earns a 2 percent pure profit from CCC's cable operations. Boulder, Colorado, City Ordinance No. 2846 (Oct. 6, 1964) at ¶ 12 (App. G. to Colo. *amicus curiae* br. for *cert.*).[27]

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27 Additionally, because cable t. v. is a commercial enterprise, see *Community Antenna Television v. City of Wichita*, 205 Kan. 537, 471 P. 2d 360 (1970), rather than a necessity of life, it does not qualify for public utility treatment under Colorado law. *See Ginsberg v. City and County of Denver*, 164 Colo. 572, 436 P. 2d

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Thus, whether or not *City of Lafayette* is construed as establishing a proprietary-governmental distinction is not dispositive with respect to the instant case. However interpreted, *Lafayette* cannot be distinguished so as to render it inapplicable here.

III. THE TENTH CIRCUIT HAS NOT PROPERLY APPLIED THE STATE ACTION IMMUNITY TESTS ESTABLISHED BY THE SUPREME COURT FOR ALL SUBORDINATE GOVERNMENTAL ENTITIES.

The so-called "state action exemption" from the federal antitrust laws is grounded in the dual federal-state system of sovereignty and the fact that Congress did not intend the Sherman Act to prohibit anticompetitive activity directed by a state. *Parker v. Brown*, 317 U. S. 341, 350-51 (1943). In recent years, decisions of this Court have established a trend consistently tightening the requirements for such exemption, thereby significantly limiting the ability of governmental entities to achieve anti-

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685 (1968). Moreover, the granting to a corporation of the right to use a city's streets, the power by which Boulder purports to act here (see note 30 *infra*), constitutes the exercise of proprietary rather than governmental authority. *City and County of Denver v. Mountain States Tel. & Tel. Co.*, 67 Colo. 225, 230, 184 P. 604, 607, *dismissed for lack of jurisdiction*, 251 U. S. 545 (1919), *overruled on other grounds, People ex rel. P. U. C. v. Mountain States Tel. & Tel. Co.*, 125 Colo. 167, 243 P. 2d 397 (1952). Furthermore, in its utilization of public rights-of-way cable t. v. is akin to taxicabs, which use public streets, and to airports and golf courses, which use public property, none of which have been found to enjoy antitrust immunity outside the Tenth Circuit. *See Woolen v. Surtran Taxicabs, Inc.*, 461 F. Supp. 1025 (N. D. Tex. 1978); *Guthrie v. Genesee County*, 494 F. Supp. 950 (W. D. N. Y. 1980), and *Pinehurst Airlines, Inc. v. Resort Air Servs., Inc.*, 476 F. Supp. 543 (M. D. N.C. 1979); *Kurek v. Pleasure Driveway & Park Dist.*, 557 F. 2d 580 (7th Cir. 1977), *vacated and remanded*, 435 U. S. 992, *reinstated on remand*, 583 F. 2d 378 (1978), *cert. denied*, 439 U. S. 1090 (1979).

trust immunity for their activities.[28] *See, e. g., Bates v. State Bar of Arizona*, 433 U. S. 350 (1977); *Cantor v. Detroit Edison Co.*, 428 U. S. 579 (1976); *Goldfarb v. Virginia State Bar*, 421 U. S. 773 (1975). Read together, the state action decisions of this Court mandate the undertaking of a thorough two-pronged inquiry in all cases involving the question of antitrust immunity for subordinate governmental entities.[29] A careful determination must be made whether there exists: (i) "contemplation" by the state that the local governmental entity will engage in the *kind* of anticompetitive activity complained of, *City of Lafayette v. Louisiana Power & Light Co.*, 435 U. S. at 415; and (ii) a clearly articulated and affirmatively expressed *state* policy to displace competition with regulation or monopoly public service, and active supervision of that policy by the *state*, *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U. S. at 105. *See generally Grendel's Den, Inc. v. Goodwin*, 5 Trade Reg. Rep. (CCH) ¶ 63,978 (1st

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28 The limiting effect of *City of Lafayette* in particular has been expressly recognized by the lower courts. *See, e. g., In re Airport Car Rental Antitrust Litigation*, 474 F. Supp. at 1088 ("The Court [in *Lafayette*] therefore placed a significant limitation on the extent to which each local governmental unit could pursue its independent economic policies and still remain exempt from the scope of the antitrust laws."); *Shrader v. Horton*, 471 F. Supp. at 1241 ("The *Lafayette* Court . . . eroded the *Parker* state action immunity doctrine by holding that municipalities enjoy immunity from the antitrust laws under *Parker* only in limited circumstances."); *Woolen v. Surtran Taxicabs, Inc.*, 461 F. Supp. at 1029 ("Justice Brennan's conclusion [in *Lafayette*] sharply limits the antitrust immunity of municipalities and other state subdivisions.").

29 Where a subordinate governmental unit is involved, an even more thoughtful and thorough analysis than normal must be undertaken with respect to state action immunity. *Whitworth v. Perkins*, 559 F. 2d at 381.

Cir. May 4, 1981); *Corey v. Look*, 641 F. 2d 32 (1st Cir. 1981); *Stauffer v. Town of Grand Lake*, 987 Antitrust & Trade Reg. Rep. (BNA) A-9 (D. Colo. Oct. 9, 1980), *appeal docketed*, No. 80-2332 (10th Cir. Dec. 19, 1980).

A. The state constitutional grant of general home rule governing power to Colorado municipalities does not evidence contemplation by the State of Colorado that such power may be used in any anticompetitive fashion.

As a home rule city under Colo. Const. art. XX, sec. 6, Boulder has all of the powers conferred by art. XX, sec. 1, thereof on the city of Denver. Colo. Const. art. XX, sec. 6 (App. E to Colo. *amicus curiae* br. for *cert.*). Consequently, Boulder is specifically empowered, *inter alia*, to regulate "works or ways local in use and extent." *Id.*, sec. 1 (App. F to Colo. *amicus curiae* br. for *cert.*). Because Colorado municipalities have no express authority with respect to cable t.v., Boulder has always relied on this enumerated power over the public rights of way as the basis for its regulation of cable television.[30]

However, the *Airport Car Rental* court expressly held that the Colorado Constitution's broad grant of home rule power to operate in a particular subject-matter area under art. XX, sec. 1, does not confer state action immunity on a recipient municipality. 474 F. Supp. at 1096. Accordingly, the Tenth Circuit ignored the specifically enumerated power contained in art. XX, sec. 1, and in effect found Boulder to have antitrust immunity stemming from the even more vague general governing authority contained in art. XX,

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30 See Boulder, Colorado, City Ordinances No. 2846 (Oct. 6, 1964) at ¶¶ 1-6, No. 4472 (Jan. 1, 1980) at ¶¶ 2-8, No. 4473 (Dec. 18, 1979) at ¶ 1, and No. 4515 (July 22, 1980) at ¶ 2 (Apps. G, H, I, and J, respectively, to Colo. *amicus curiae* br. for *cert.*).

sec. 6.[31] 630 F. 2d at 706-07. That provision has nothing to do with cable t.v. or even anticompetitive conduct; it merely confers on Boulder the right of self-government over local and municipal matters within its own borders.[32]

The mere grant of such general home rule governing power cannot *ipso facto* confer antitrust immunity on municipalities. For one thing, such power does not constitute "'authority . . . to operate in *a particular area . . .*'" and so cannot evidence contemplation of "'the *kind* of action complained of.'" *City of Lafayette v. Louisiana Power & Light Co.*, 435 U. S. at 415 (emphasis added, footnote and citation omitted). Additionally, there can be no "contemplation" of any anticompetitive activity within the meaning

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31 A virtually identical approach was employed by the courts in *Pueblo Aircraft Serv., Inc. v. City of Pueblo*, 498 F. Supp. at 1209-10, and *Glenwillow Landfill, Inc. v. City of Akron*, 485 F. Supp. at 677-78.

32 An additional underpinning of the Tenth Circuit's opinion on Boulder's immunity was the decision in *Manor Vail Condominium Ass'n v. Town of Vail*, — Colo. —, 604 P. 2d 1168 (1980). The court below viewed that case as acknowledging, *sub silentio*, that the anticompetitive activity of setting rates for cable t. v. constitutes a valid exercise of municipal home rule power. 630 F. 2d at 706. However, *Manor Vail* was a fourteenth amendment equal protection case, and the Colorado court there considered no antitrust issues whatever. *See* 630 F. 2d at 718 (Markey, C. J., dissenting). Thus, it cannot be inferred from *Manor Vail* that Colorado home rule cities are empowered to engage in any anticompetitive activity relative to cable television. Moreover, *Manor Vail* did not involve the same type of activity as that at issue here. *Id.* n. 19. Consequently, even if interpretation of that case could be stretched to imply contemplation that home rule cities may set cable t. v. rates, it provides no authority whatever for such municipalities to engage in a *different kind* of activity such as imposing a limitation on expansion of cable t. v. service. *See Woolen v. Surtran Taxicabs, Inc.*, 461 F. Supp. at 1031-32 (conferral of anticompetitive power to set rates and prohibit use of streets without governmental consent held not to contemplate use of such power to establish monopoly). Thus, in fact, *Manor Vail* provides no support for the Tenth Circuit's decision.

of *City of Lafayette* where, as here, there is no requirement or even suggestion regarding the *manner* in which such general governing power is to be used. *In re Airport Car Rental Antitrust Litigation*, 474 F. Supp. at 1096. Indeed, even the granting of general power to operate in a particular area does not evidence contemplation that such power may be used in any anticompetitive fashion.[33] *Id.* Finally, viewing amorphous general governing powers as authorizing anticompetitive conduct by home rule cities affords virtual blanket antitrust immunity to such municipalities *whenever* they exercise those powers, a result prohibited by *Lafayette*. *Woolen v. Surtran Taxicabs, Inc.*, 461 F. Supp. at 1031-32.

In view of the preceding, the conferral of general home rule governing power on Colorado municipalities by Colo. Const. art. XX, sec. 6, does not evidence contemplation by the State of Colorado that such power may be used in an anticompetitive manner.

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33 *Accord, Feminist Women's Health Center v. Mohammad*, 586 F. 2d at 550 (general authority to police improper, unqualified or irresponsible practice of medicine does not comprehend use of such power in anticompetitive fashion to force termination of practices not adjudicated illegal or improper); *Kurek v. Pleasure Driveway & Park Dist.*, 557 F. 2d at 590 (statutes conferring general authority over operation of golf courses neither compelled nor authorized anticompetitive exercise of such power to engage in price fixing); *Guthrie v. Genesee County*, 494 F. Supp. at 955-56, and *Pinehurst Airlines, Inc. v. Resort Air Servs., Inc.*, 476 F. Supp. at 552 (statutes conferring general authority over establishment and operation of airports neither directed nor contemplated use of such authority in anticompetitive manner to prevent *particular* airline from becoming fixed-based operator); *Mason City Center Assocs. v. City of Mason City*, 468 F. Supp. at 743 (statute conferring general zoning powers neither mandated nor contemplated entry into anticompetitive agreements relative to exercise thereof); *United States v. Texas State Bd. of Pub. Accountancy*, 464 F. Supp. at 404 (statute generally authorizing adoption of rules appropriate for maintaining high standards of professional integrity neither mandated nor contemplated adoption of rule prohibiting competitive bidding).

B. The State of Colorado has no specific policy with respect to cable television and does not exercise supervisory power over that subject-matter area.

In Colorado, there exists no express state policy relative to cable television. Neither the Colorado Constitution nor any state statute addresses the subject and no agency or mechanism has been established by Colorado for active supervision of cable television. Even the Colorado Public Utilities Commission has declined to exercise jurisdiction over the subject. *See In re Mountain States Telephone & Telegraph Co.*, 73 P. U. R. 3d 161, 172-173 (Colo. Pub. Util. Comm'n 1968).

In light of the foregoing, it cannot be said that Colorado has a comprehensive policy—which is clearly articulated, affirmatively expressed and actively supervised by the state—to displace competition in cable t.v. with regulation or monopoly public service as required by *Midcal. Community Communications Co. v. City of Boulder*, 630 F. 2d at 717 (Markey, C. J., dissenting). In fact, the only express cable t.v. policy or action involved in the case at hand is that of the city of Boulder itself: "[W]e are here concerned with City action in the absence of any regulation whatever by the State of Colorado. . . . We have only the action or exercise of authority by the City. . . . [T]he regulation here concerned was . . . the only expression of policy as to the subject matter." *Id.* at 707.

Thus, there is no *state* policy which expressly relates to the subject of cable television. Like the situation in *Cantor*, the most that could be said here is that the state's express policy with respect to cable t.v. may be neutral. *See* 428 U. S. at 584-85. *See also Goldfarb v. Virginia State Bar*, 421 U. S. at 790. In such situation, Colorado presumably would intend that its home rule cities exercise their powers in a manner consistent with the antitrust

laws and the strong national policy in favor of competition. *See City of Lafayette v. Louisiana Power & Light Co*, 435 U. S. at 414-15; *Mason City Center Associates v. City of Mason City*, 468 F. Supp. 737, 743 (N. D. Iowa 1979).

Notwithstanding the foregoing, there are two policies of the State of Colorado which are implicitly applicable to cable television. The first such policy is that of conferring self-government on municipalities via home rule. That is not, however, a "state policy *to displace competition with regulation or monopoly public service . . .* " as required by *City of Lafayette*. 435 U. S. at 413 (emphasis added). Rather, it is merely a state policy to decentralize government. Moreover, in order to make such policy of localizing government work, it is neither necessary that cities have antitrust immunity at all nor that such immunity extend to every action they may undertake pursuant to their home rule powers. *See Cantor v. Detroit Edison Co.*, 428 U. S. at 597. *Accord, City of Lafayette v. Louisiana Power & Light Co.*, 435 U. S. at 417 (Marshall, J., concurring); *id.* at 426 (Burger, C. J., concurring); *Corey v. Look*, 641 F. 2d at 37.

Colorado's second state policy which is applicable to cable t.v. is the pro-competitive one set forth in its antitrust statute. *See* Colo. Rev. Stat. 1973, sec. 6-4-101 *et seq.*[34] *City of Lafayette* makes clear that pro-competitive antitrust policies take precedence over the parochial interests of individual cities. 435 U. S. at 408. Nevertheless, the court below conversely ruled that the actions and interests of the city of Boulder *alone* were sufficient to

34 The Colorado antitrust statute, because it ordinarily applies to Colorado cities and towns and establishes statewide policy, is applicable to home rule cities. *See* Colo. Const. art. XX, sec. 6 (App. E to Colo. *amicus curiae* br. for cert.).

override the policies expressed in the antitrust laws and meet the requisites of *Midcal*. 630 F. 2d at 708.[35]

In the thirty-eight years since the state action immunity doctrine was first announced in *Parker*, this Court has never found an antitrust exemption without action or an expression of policy by the *state itself*. Moreover, outside the Tenth Circuit, no post-*Lafayette* lower federal court case has found such immunity without the existence of both a state policy and a state supervisory agency. Even in the *Glenwillow Landfill* municipal home rule case both conditions were met. *See* 485 F. Supp. at 675-77. Consequently, antitrust immunity cannot exist in a situa-

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35 The basis for the Tenth Circuit's holding in this regard was its determination that cable t.v. is a matter of purely local concern over which a Colorado home rule city has the full right of self-government. *Id.* at 706-07. Under Colorado law, however, whether a particular matter is of local concern depends, *inter alia*, on the inherent nature of the activity and its impact and effect, if any, on areas outside the city. *People ex rel. P. U.C. v. Mountain States Tel. & Tel. Co.*, 125 Colo. 167, 172, 243 P. 2d 397, 399 (1952) (intra-city telephone service not purely local for Colorado home rule cities). The Tenth Circuit's reasoning fails because cable t.v. is inherently more than just local in character. *See United States v. Southwestern Cable Co.*, 392 U.S. 157, 168-69 (1968) (cable t.v. involves interstate commerce); *TV Pix, Inc. v. Taylor*, 304 F. Supp. 459 (D. Nev. 1968), *aff'd per curiam*, 396 U. S. 556 (1970) (cable t.v. is in, and an integral part of, interstate commerce); *Nugent v. City of East Providence*, 103 R. I. 1518, —, 238 A. 2d 758, 762 (1968) (cable t.v. is not so restricted to city's confines as to be purely local for home rule purposes). Accordingly, a Colorado home rule city such as Boulder does not have complete authority relative to cable t.v., and its ordinance would be inferior to a general state law on the subject. *See Ray v. City & County of Denver*, 109 Colo. 74, 121 P. 2d 886 (1942). Moreover, in any event Colorado home rule municipalities are not city-states with plenary powers, *City of Golden v. Ford*, 141 Colo. 472, 478, 348 P. 2d 951, 954 (1960), *City of Denver v. Sweet*, 138 Colo. at 48, 329 P. 2d at 444-45, and so are not "sovereigns" equivalent to the state within their own borders.

tion, such as the one here, where there has been no action whatever by the state relative to the subject-matter area in question and the main state policy which is applicable favors competition.

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CONCLUSION

In its decision in this case, the Tenth Circuit in effect found the city of Boulder, Colorado, because of its home rule status, to be the fifty-first state of the union and therefore to be exempt from the antitrust laws. The practical difficulty presented by such holding is that thousands of other cities across the country also possess extensive home rule powers for general governance. Yet, "Congress intended to strike as broadly as it could in section 1 of the Sherman Act, and to read into it so wide an exemption . . ." as that found by the Tenth Circuit here "would be at odds with that purpose." *Goldfarb v. Virginia State Bar*, 421 U. S. at 787.

The dual federal-state system of sovereignty which gives rise to the state action exemption requires that *states* be allowed to use their municipalities to administer *state* competition-displacement policies free of the inhibitions of the antitrust laws. *See City of Lafayette v. Louisiana Power & Light Co.*, 435 U. S. at 415. Federalism neither requires nor allows cities, whether home rule or otherwise, to disregard the antitrust laws when *acting on their own* in the execution of *municipal* policies to displace competition. Accordingly, home rule cities may have state action immunity only where the state, acting as sovereign, has made an affirmative policy choice to insulate the activities of its subordinate governmental units in a particular subject-matter area from antitrust attack. Any

other conclusion elevates the purely parochial interests of individual local government units to a position of pre-eminence over the national economic policy favoring competition which is embodied in the antitrust laws. *See id.*

For all of the foregoing reasons, the twenty-three *amici* states joining in this brief request this Court to reverse the decision of the Tenth Circuit conferring absolute antitrust immunity on cities exercising home rule powers.

Respectfully submitted,

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No. 80-1350

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

COMMUNITY COMMUNICATIONS COMPANY, INC., *Petitioner,*

v.

CITY OF BOULDER, COLORADO, *Respondent.*

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF RESPONDENT AND BRIEF *AMICUS CURIAE* OF CABLE TELEVISION INFORMATION CENTER

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On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

The Cable Television Information Center ("CTIC") hereby moves the Court for leave to file the attached brief *amicus curiae* in support of the Respondent, pursuant to Rule 36, for the reasons set forth below.

I. Nature Of CTIC's Interest.

The Cable Television Information Center is a not-for-profit organization which was created in 1972 to serve as an objective, national source of information on cable television and to assist local officials in making more informed decisions concerning licensing and regulation of cable systems. During almost nine years of operation,[1] CTIC has provided the public and local com-

[1] From 1972 to 1980, CTIC was part of The Urban Institute in Washington, D.C. In 1980, it became an independent membership organization, obtaining partial support from member cities and the remainder of its funds from publications and technical services to

munities with a variety of services, including: publications and studies on cable television technology, regulation, and economics; a monthly newsletter; seminars and workshops on community uses of cable TV; advisory assistance on franchising methods, evaluation of competing franchise applicants and industry trends. CTIC has no affiliation with any cable television company or equipment manufacturer.

CTIC believes that local governments can effectively deal with the technical and regulatory problems posed by cable TV if they do so on an informed basis. To that end, CTIC has since 1972 provided assistance to more than 2,000 municipalities. Accordingly, it is well qualified to address the role of local governments in cable TV regulation and the likely consequences of a ruling for the petitioner in this case.

CTIC seeks to represent the substantial interests of its 175 member cities, including Boulder, Colorado, in the resolution of the questions before the Court since an adverse holding in this case may effectively preclude them from regulating cable television. CTIC offers the Court its perspective on the need to immunize local government actions in the field of cable TV from antitrust litigation.

The briefs filed by the parties herein are unlikely to address the public policy issues related to cable television technology and regulation, focusing instead on the antitrust questions. CTIC seeks to present an alternative perspective on the implications of this case for local

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municipalities. In 1981, the membership, publications and general information services of CTIC were separated from the paid technical services which were taken over by CTIC Associates, a for-profit organization.

regulation, taking into account the tremendous potential impact of cable on every community in this country. The dramatic advances in the capabilities of cable TV in recent years have made possible a revolution in local as well as national communications. This communications revolution is not simply in entertainment, but in police and fire protection, education, transportation, health care, community programming and local commerce. Thus, cable TV has the potential to affect the everyday life of virtually every citizen to whom it is made available and it will perform an increasingly important function in providing communications within local communities.

The briefs filed herein are also not expected to contain any discussion of communications policy as it relates to this appeal. Yet, this case did not arise in a regulatory vacuum. Cable television has been subject to regulation by the Federal Communications Commission ("FCC") for more than a decade. In recent years, the FCC has shifted its regulatory approach in terms of federal involvement. However, the FCC has consistently underscored the legitimacy and importance of local government in cable regulation. As evidenced by its mandatory franchising standards, the FCC considered local regulation to be both valid and desirable. And, despite its subsequent shift to "deregulation," the FCC made clear that its purpose was not to free cable TV of all regulatory controls, but rather to give local authorities the flexibility to franchise and regulate based on local public policy considerations. Thus, one purpose of the attached brief is to place the legitimate regulatory role of local government in a federal communications policy perspective.

II. The Relevancy Of The Matters Which CTIC Seeks To Address.

CTIC seeks leave to file its brief principally to discuss: (a) the established pattern of local government regulation of cable TV pursuant to broad delegation of state authority; (b) the nature of the cable TV industry today and the fundamentally local policy issues which must be resolved; and (c) the chaos that is likely to ensue for cities, for the courts and possibly for the cable industry if this Court rules for the petitioner.

The nature of cable television systems today is relevant to this case. Recent developments in cable TV technology have brought about profound changes in the types of services offered which will bring about fundamental changes in communications within the communities served. Cable systems can provide communications services in areas which have traditionally been a primary concern of local government. The underlying issue in this case is whether thousands of municipalities which seek to ensure that high quality cable TV service will be provided to their citizens will be subjected to extended and enormously expensive antitrust litigation if they act without first having received a specific form of authority from the state — even if broad authority to regulate already exists. The nature of cable TV and the interest of the local community are central considerations in resolving that issue.

Many of the regulatory provisions adopted by local governments today arguably have significant anticompetitive effects and may even constitute *per se* violations of the Sherman Act, absent immunity. The Court's resolution of the municipal immunity issue will determine whether local governments are to have any continuing

role in regulating cable television. Under the umbrella of antitrust immunity, local regulation serves to protect the public interest in areas such as safety, technical quality and ensuring nondiscriminatory service throughout the community. To strip municipalities of antitrust immunity may well prevent the proper resolution of these vital local concerns.

III. Conclusion.

CTIC seeks to address several issues specifically related to cable television regulation which have not been adequately addressed by the other briefs filed in this proceeding.

CTIC has sought, and has been denied, the consent of counsel for Community Communications Company, Inc., to file its Brief. For the reasons set forth above, CTIC respectfully requests that the Court grant its leave to file the attached Brief *Amicus Curiae* In Support of Respondent.

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1980

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v.

CITY OF BOULDER, COLORADO, *Respondent.*

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF ON THE MERITS

INTEREST OF THE AMICUS

The nature of CTIC's interest in this litigation is set forth in the foregoing Motion For Leave To File Brief *Amicus Curiae* In Support Of Respondent.

SUMMARY OF THE ARGUMENT

The established framework for regulation of cable television service places principal reliance on local government. Since cable service, by its very nature, makes use of the public streets and rights-of-way, municipalities must approve any proposed system and may impose reasonable conditions on their consent. Moreover, pursuant to its broad police power, local government has the authority to ensure that cable service is provided in a manner that serves the public interest. The Federal Communications Commission has long recognized the legitimate role of municipal government

in regulating cable service as consistent with federal telecommunications policies.

It is appropriate for local government to have a primary regulatory role because cable television presents public policy issues which are fundamentally local in nature, requiring familiarity with conditions in the local community. By the nature of the industry itself, cable service historically has shown a strong tendency toward local monopoly, giving rise to a need to ensure reliable service to the entire community at reasonable rates. In addition, recent technological advances have enabled cable to perform functions which are uniquely local and which have traditionally been the concern of municipal government.

Municipal regulation of cable service is widespread. In the majority of states regulation is undertaken pursuant to grants of governmental authority which do not explicitly articulate a state policy to supplant competition. Many of the most prevalent forms of cable television regulation may be anticompetitive, but serve important needs of the community and the cable industry itself. Absent immunity, thousands of municipalities will be potentially subject to antitrust litigation which, by its nature, is complex, lengthy and expensive. Relatively few municipalities can afford the expense of defending such litigation, regardless of the outcome, much less afford to run the risk of treble damages. If the Tenth Circuit's decision is reversed, local regulation of cable television under existing authority will effectively be eliminated. In addition, numerous municipalities will be subject to suit for actions already taken, producing a flood of litigation in the federal court system.

Elimination of local regulation will leave cable TV largely unregulated. As a result, the important questions of public policy raised by cable service will remain unresolved, to the detriment of the public and, in the long run, the industry itself.

ARGUMENT

I. THE ESTABLISHED PATTERN OF MUNICIPAL REGULATION OF CABLE TELEVISION REFLECTS THE LOCAL NATURE OF THE REGULATORY ISSUES INVOLVED.

A. There Is An Established And Widespread Pattern Of Local Regulation Of Cable Television Under Broad Existing Municipal Authority.

In practice, the licensing and regulation of cable television has been performed by local governments in the vast majority of the states. Currently, there are 4,343 cable TV systems in operation in 10,515 communities throughout the country, most operating under local franchises.[1] This local regulation has taken place with the express approval of the Federal Communications Commission ("FCC") and with the express or tacit approval of the 39 states which have not vested regulatory oversight of cable TV in a state agency. Only 11 states have enacted legislation establishing regulatory programs administered by a state agency.[2]

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[1] Television Digest, Cable Addenda to Television Factbook No. 50 (June 1, 1981).

[2] Federal Communications Commission, Cable Television State Regulation (June, 1981); S. Briley, *State Involvement in Cable TV and Other Communications Services: A Current Review*, in THE CABLE/BROADBAND COMMUNICATIONS BOOK, Vol. 2, p. 45 (M.L. Hollowell ed. 1980). The statutes are listed in Appendix A.

Only five of these states—Alaska, Connecticut, Hawaii, Rhode Island and Vermont—have fully preempted local franchising

In 15 states, specific statutory authority has been conferred on municipalities to license and regulate cable systems.[3] Such legislation has been enacted primarily to remove any question concerning the authority of municipalities to regulate under either general police powers or the power to impose conditions on use of the public rights-of-way.[4] In the remaining 24 states, municipalities have granted licenses or franchises and have imposed restrictions on cable TV systems under traditional grants of general governmental authority, in the absence of specific state authorization to do so. Therefore, in a total of 39 states there is an established pattern of licensing and regulation of cable television by local government under grants of authority which may well come under antitrust scrutiny if the Court holds for the petitioner.

In order for a cable system to operate in a municipality, it must construct a wired system which uses the public streets and rights-of-way. As a result, local government authorization for cable system construction is essential, absent total state preemption of the field. Municipal corporations possess the power to ensure the health, comfort and welfare of their inhabitants, including the power to promote communication and to facilitate local commerce. 12 E. McQUILLIN, MUNICIPAL

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authority, placing total regulatory control in the hands of their public utility commissions. In three other states, which place oversight in their state utility commissions—Delaware, Nevada and New Jersey—local municipalities retain the authority to grant cable franchises. Massachusetts, Minnesota and New York have independent state cable agencies but nonetheless leave franchising authority in the hands of local government.

[3] The statutes are listed in Appendix B.

[4] T.A. Muth, *State Cable Legislation,* Cable Communications and the States (New York State Senate, 1975).

CORPORATIONS, §24.33 (3d rev. ed. 1970). It is similarly well established that if the consent of the municipality is required to use the public right-of-way, the municipality may impose reasonable conditions on its consent which bind the user of the right-of-way. *Id.* §34.36. Thus, municipalities generally have the power to license and regulate cable under their traditional home rule and police powers in the absence of constitutional or statutory provisions specifically limiting such power. It therefore follows that delimiting the geographic boundaries of a franchise area — at issue in this case — should no more be subject to challenge under federal antitrust laws than other legitimate acts of local government restricting business activities, such as reasonable zoning restrictions for commercial and residential construction.

B. Federal Policy, As Expressed By The Federal Communications Commission, Has Consistently Recognized And Underscored The Fundamental Role Of Local Government In Licensing And Regulating Cable Systems.

The Federal Communications Commission ("FCC") consistently has recognized the legitimacy and importance of municipal regulation of cable, even as it has "deregulated" at the federal level. In 1972, following 10 years of evolutionary involvement in cable television regulation, the FCC adopted a comprehensive regulatory plan for cable.[5] *Cable Television Report and*

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[5] One of the parties commenting in this rulemaking was Community Tele-Communications, Inc., petitioner's corporate affiliate, which "supported a more flexible course whereby the Commission, as suggested in our third alternative, would pre-empt some areas, establish minimum standards for state and local authorities to follow in others, *and leave purely local matters to the appropriate local entity.* " 37 Fed. Reg. 3252, 3275 (1972). (Emphasis added.)

Order, 37 Fed. Reg. 3252 (1972).[6] Faced with the need to clarify appropriate federal, state and local regulatory roles, the FCC established a regulatory structure for cable TV based upon a deliberately-structured dualism, with the federal government exerting preemptive authority in certain areas and state and local governments permitted to regulate in all others. In its 1972 Report, the Commission specifically addressed the appropriate role of local government authorities in the licensing and regulation of what was then recognized as an "emerging technology that promises a communications revolution." 1972 Report at 3277.

> "We agree that conventional licensing would place an unmanageable burden on the Commission. Moreover, *local governments are inescapably involved in the process because cable makes use of streets and ways and because local authorities are able to bring a special expertness to such matters, for example, as how best to parcel large urban areas into cable districts.*" 1972 Report at 3276. (Emphasis added.)

The Commission established minimum local franchise standards which required that local authorities incorporate certain regulatory provisions in their franchise ordinances covering "the franchise selection process, construction deadlines, duration of the franchise, rates and rate changes, the handling of service complaints and the reasonableness of franchise fees." 1972 Report at 3276. The FCC considered local governments well-suited to determine whether cable system construction should be restricted to a given area and required that franchis-

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[6] Hereinafter, "1972 Report."

ing authorities provide for timely construction of the system, stating:

> "*Another matter uniquely within the competence of local authorities is the delineation of franchise areas.* We emphasize that provision must be made for cable service to develop equitably and reasonably in all parts of the community. A plan that would bring cable only to the more affluent parts of a city, ignoring the poorer areas, simply could not stand. . . .While it is obvious that a franchisee cannot build everywhere at once within a designated franchise area, provision must be made that he develop service reasonably and equitably. *There are a variety of ways to divide up communities; the matter is one for local judgment.*" 1972 Report at 3276. (Emphasis added.)

In its *Clarification of Rules and Notice of Proposed Rulemaking,* 39 Fed. Reg. 14288 (1974), the FCC again identified local franchising authorities as best suited to delineate franchise districts and specifically noted its approval of local decisions to restrict franchisees to discrete sections of the franchise area.

> "It was our intent that all parts of a franchise area that could reasonably be wired would be wired. . . .
>
> Clearly, this problem can best be dealt with at the local level since every community presents unique demographic vagaries. Some over-all guidelines, however should be set out. Obviously, the ideal case is where a franchisee is required to wire the entire franchise area. This is our present rule. The purpose of the rule was to assure that no 'cream-skimming', wiring just the economically lucrative portions of a franchise area, would take place. *We are aware, however, that many franchises are being granted that do not encompass the entire political subdivision of the grantor.* Such grants are

> appropriate so long as they are not used as a device to deprive certain portions of the population of service. *In some cases, cities decide to grant multiple franchises to different franchisees for various discrete sections of the franchise area. This is acceptable so long as the ultimate result is complete coverage of the area.*" 39 Fed. Reg. 14288, 14294 (1974) (Emphasis added.)

Furthermore, while the Commission generally avoided expressing an opinion as to whether the state or municipal level of government was best suited to regulate in particular subject areas, it consistently singled out the issue of delineating franchise areas as a uniquely local task. After reviewing various options, it concluded that such matters present uniquely local problems:

> "We can see reasonable justifications in all of these approaches. *They point up the necessity of local involvement in the cable process to deal with the unique problems presented by various communities.* We think it would be a mistake to attempt to specify a nation wide rule on this point. *Indeed, it might be very difficult to create any such rule even on a state by state level. This is a job for the localities.*" 39 Fed. Reg. 14288, 14294 (1974). (Emphasis added.)

By 1979, the Commission was substantially removed from its deep involvement in cable television regulation. However, as it sought to "deregulate" cable at the federal level, the FCC's clear intent was to leave "maximum flexibility" and responsibility for franchising decisions in the hands of local authorities.

> "The decision to delete certain of our former franchise standards was difficult. In our judgment, the goals that these franchise standards sought to further were — and still are — reasonable, fair, and laudatory. . . . *We now seek to allow these local*

> *authorities maximum flexibility to franchise cable operators in a manner that will best serve the interests of their citizens,* at least as long as the actions taken at the local level will not undermine important and overriding federal interests. Our deletion of these mandatory standards therefore should not be viewed as a retreat on the issues of fair procedures, protection of the cable consumer, and the like, *but as a decision to leave responsibility in these areas where it appears to belong — in the hands of the local authorities who will have the ultimate responsibility for enforcing these provisions."* 44 Fed. Reg. 25245, 25246 (1979). (Emphasis added.)

Thus, federal communications policy has consistently recognized the critical role of local government in regulating cable TV and has underscored the premise that local regulation is legitimate and valid.

C. The Regulatory Issues Raised By Cable TV Are Fundamentally Local In Nature.

The established regulatory framework for cable TV, by placing primary reliance on municipal government, recognizes that the regulatory issues involved are fundamentally local in that their proper resolution requires familiarity with community conditions and needs. The local nature of the issues derives primarily from the basic economics of the industry and the nature of the service itself.

Historically, cable systems have enjoyed a *de facto* monopoly in the area served, even where two companies initially enter the market. Essentially, this is because in most cases the market is insufficient to support more

than one company.[7] This clear tendency towards monopoly status raises difficult policy questions when a community seeks to issue or renegotiate a cable TV franchise. For example, local authorities must determine whether a cable system operator should be able to serve only the most lucrative parts of a community, based strictly on marketplace considerations, or whether the local government can guarantee that service will be afforded throughout the area. If it is economically feasible to have only one cable TV system in a given community, the local government must determine whether reasonable rates can be ensured. To resolve these questions relating to the economic viability of a proposed system requires familiarity with local conditions such as population densities, land use planning and zoning patterns and the needs and interests of the community. These are appropriate matters of local concern which are within the competence of local officials.

In addition to these basic public policy concerns, recent technological advances in cable service have given rise to unique opportunities to enhance community life and provide essential services. The number of channels available for communication has dramatically increased,[8]

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[7] While there may be a variety of possible explanations for this *de facto* monopoly situation, the fact remains that virtually every municipality in the country with cable service is served by a single cable system in any given geographic area. See note 21, *infra*.

[8] See, *e.g.*, R.L. Smith, *The Birth of a Wired Nation*, CHANNELS OF COMMUNICATIONS, p. 32 (April-May 1981). In its early stages of development, cable systems provided a maximum of 5 to 12 TV channels. However, recent advances in electronic components now permit transmission of more than 50 video channels on a single coaxial cable. It is not unusual today for cable television companies to offer communities multi-cable systems with a capacity of well over 100 television channels and numerous data channels. As a

and two-way communication is now feasible,[9] making possible a wide spectrum of new services. The following sampling of *services now available* suggests the potential impact cable television may have on a local community:

— Computerized burglar and fire alarm protection through which police and fire departments are notified of emergencies and can be given background information concerning the number of occupants of a residence, the ages of children in the household, the name and phone number of the family doctor, etc.;

— Information concerning public transportation, including bus, train and airline timetables;

— Separate "institutional networks," interconnecting schools, hospitals, libraries, police and fire stations and other local institutions which may originate as well as receive training and educational programming, data transmissions and other services on a one-way or two-way basis;

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result, cable TV can provide not only a wide variety of entertainment programming, but also a vast array of other telecommunications services.

[9] See, *e.g.*, CABLEVISION (June 22, 1981). As a result of the development of "interactive" or two-way communication, cable systems can now permit communication not only from the cable company to the consumer, but also "upstream" data or video communication from the consumer or an institution back to the cable TV company, or to other users of the system. As long ago as 1972, the FCC foresaw that cable service had the potential to provide, among other services, "special communications systems to reach particular neighborhoods or ethnic groups within a community, and for municipal surveillance of public areas for protection against crime, fire detection, control of air pollution and traffic; and various educational and training programs . . ." 37 Fed. Reg. 3252 n.10(1972).

— Provision of health care information;

— Special services for the blind, the hearing impaired and those with learning disabilities;

— Educational programming produced locally or obtained from a variety of program sources;

— Calendars of recreational events and local park information;

— A method by which subscribers' televisions can be turned on and emergency weather or civil defense alerts can be transmitted to override all programming.

As the list above indicates, cable systems are no longer limited to offering entertainment programming. Cable service now has the potential to affect almost every aspect of community life.[10] Moreover, many of the services offered have traditionally been primary functions of municipal government. The manner in which these services are provided is clearly a legitimate subject for local concern.

II A. RULING FOR THE PETITIONER WOULD EFFECTIVELY ELIMINATE THE ESTABLISHED PATTERN OF MUNICIPAL REGULATION OF CABLE TELEVISION.

A. The Positions Of The Petitioner And The *Amici* States Would Subject Several Thousand Municipalities To Antitrust Scrutiny.

Petitioner and the *amici* states assert that in order to enjoy immunity from antitrust litigation,[11] a municipal

[10] See R.L. Smith, *supra*, n.8.

[11] Of course, the issue is not total immunity from litigation but whether that litigation can be disposed of summarily. See Section II.C. *infra*.

government which seeks to regulate cable TV in the local public interest must be not only authorized to do so by specific state legislation, but that the state must clearly express a policy to displace competition with regulation or monopoly public service in that area of activity.[12]

It is CTIC's position that a grant of constitutional or statutory power over local matters, sufficient under state law to confer municipal authority to license cable systems, is also sufficient to immunize local governments from antitrust litigation challenging the exercise of that governmental power. The authority to regulate inherently includes the power to limit competition by restricting business activities in a manner which serves the public interest. If regulatory power is delegated to local government by state constitution or statute, the federal antitrust laws should not require the states to enact narrow legislation in a particular subject matter for the express purpose of reiterating that inherent power to limit competition. If the state is dissatisfied with the manner in which the local authority is exercised, either because of its anticompetitive effects or for any other reason, it can specifically revoke its grant of authority or seek to preempt regulatory control of the subject matter. *The fundamental point is that, by conferring the power to govern and to regulate in local matters, the state has conferred on local government the power to make the*

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[12] Petitioner's Brief at 35; *Amici* States' Brief at 21. The petitioner and the *amici* states place principal reliance on their interpretation of *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389 (1978). The *amici* states go further by suggesting that each state must actively supervise an expressed policy to displace competition. *Amici* States' Brief at 21.

legislative judgment as to which, if any, anticompetitive restrictions are in the public interest. To suggest otherwise is to confuse the *form* of the delegation of power with the *substance* of the power conferred.

The standards espoused by petitioner and *amici* states would open to antitrust challenge innumerable municipal governmental acts which are clearly anticompetitive but which constitute reasonable restrictions on business activity.[13] Furthermore, in the context of municipal authority over cable TV, such a standard would open to antitrust scrutiny the acts of local government in, at minimum, all of the states in which no cable TV legislation has been enacted and in which municipalities act on the basis of general grants of local governmental powers. Moreover, even in the 15 states in which municipalities have been granted specific authority to license cable systems, it is probable that the standard proposed would not be met, since the statutes do not explicitly articulate a state policy to displace competition. In addition, many state statutes would be subject to challenge on the ground that they do not provide any mechanism for active supervision by the state, as the *amici* states would require.[14] In short, the standard espoused by petitioner and the *amici* states would probably subject municipal regulation of cable TV in 39 states to antitrust scrutiny.

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[13] See Respondent's Brief, Section II.A.

[14] *Amici* States' Brief at 21. The states rely principally on *California Retail Liquor Dealers Association* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980).

B. Typical Forms Of Municipal Cable TV Regulation May Have Anticompetitive Effect, But Serve Legitimate Public Interests.

The regulatory policies of local governments, which are expressed through franchising decisions and regulatory restrictions, serve important public interests. Yet, because these governmental acts may have anticompetitive effects, they would clearly be vulnerable to antitrust attack if the Tenth Circuit's decision is reversed. For example, one common regulatory decision is to award a single, nonexclusive franchise and require the franchisee to provide service throughout the franchise area. Such provisions usually involve a commitment by the franchisee to construct the system in accordance with a schedule and to serve all areas of the community determined to have sufficient density of population for cable service to be economically viable.[15] Granting a "nonexclusive" franchise gives the local government the option to grant another franchise if it would result in better service, or at such time as economics permit head-to-head competition.[16] Such franchise provisions are typical where cable systems are in operation. Attached to this Brief as Appendix C is a representative sample of municipal ordinances which do so.

Granting a single franchise and requiring service to the entire franchise area can serve the public interest and the interest of the cable television industry in several ways. First, it recognizes that cable service cannot simply be left to the marketplace and the cable operator's discretion, if discriminatory service patterns are to be

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[15] Cable systems generally need not serve sparsely populated areas, but they may not "cream skim" by serving only the wealthy or most densely populated portions of a community.

[16] See note 21, *infra*.

avoided.[17] Second, by granting a single franchise, municipalities recognize that, by its very nature, cable television is a capital-intensive industry with high fixed costs.[18] As is true of utilities, the economies of scale mean that an increase in the number of subscribers lowers the average capital cost per subscriber.[19] If two cable companies were to lay their wires and compete for subscribers in the same geographic area, both companies would incur similar initial fixed costs. As a result, the average capital cost per subscriber (which implicity affects subscriber rates) would be approximately doubled. By granting a single franchise, usually after competitive bidding, a municipality can accomodate the need to minimize the average fixed cost per subscriber. In addition, the franchisee is reasonably assured of a stable market upon which long-range financial planning can be based. This enables the operator to provide higher quality commercial services at reasonable rates as well as a wider variety of community services than might otherwise be possible. In short, granting a single, nonexclusive franchise can permit the community to ensure that high

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[17] The Federal Communications Commission and state agencies which regulate cable have sought to ensure that nondiscriminatory service will be provided subject to reasonable economic limitations due to sparsity of population.

[18] Providing service requires a heavy initial investment in highly specialized electronic equipment and heavy installation costs for placing cable on utility poles or under the public streets. For example, it is estimated that in one urban area (Brooklyn, N.Y.) the average cost of installing one mile of cable will be $99,050, and the service area requires installation of 1,580 miles of cable. Paul Kagan Associates, Inc., Cable TV Regulation, p. 3 (March 27, 1981).

[19] The cost of connecting an individual subscriber is relatively small in comparison to the expenses for equipment and installation of the trunk cables and distribution system.

quality communications services will be made available to all sectors of the community at reasonable rates.[20]

At the same time these regulatory techniques pose obvious problems under an antitrust analysis. When only one franchise is granted, even if it is a "nonexclusive" franchise, potential competitors may be excluded from the market by agreement between the local government and the franchisee. In addition, requiring service to an entire franchise area excludes from the marketplace those cable companies unwilling to provide such service. Thus, the potential anticompetitive effect is clear.

Another common form of restriction is local rate regulation, which typically establishes a maximum charge or schedule of charges for different levels of service. Numerous municipalities in this country have ordinances which impose such restrictions, in part because from 1972 until 1976 FCC regulations required that local ordinances incorporate provisions for rate regulations. 47 C.F.R. § 76.31 (a)(4) (*promulgated* 37 Fed. Reg. 3252, 3281 (1972); *deleted* 41 Fed. Reg. 34963, 34968 (1976)). Rate regulation may serve important public interests. In point of fact, the subscribers to 99% of the systems in the country are served by only one cable system.[21]

[20] Historically, even where more than one franchise has been awarded, only one cable system ultimately remains in the market and provides service. See note 21, *infra*.

[21] Pilnick, March 5, 1980, Tr. 38-39, 42-44, 129, 132, 151; Sample, March 4, 1980, Tr. 218; Westdyke Dep. 38-39. Usually the number of subscribers is insufficient to support two systems. (Pilnick, March 5, 1980 Tr. at 37, 40, 44-46, 54-55). In addition there are physical problems involved, including the cost of rearranging lines on utility poles or the expense of underground installation. (Id. at 33-37, 41; Sample, March 4, 1980, Tr. at 226; Olson, March 6, 1980, Tr. at 58-63) (Testimony at the preliminary injunction hearing is cited by the name of the witness, the date and the page number of the transcript. Deposition testimony is cited by the witness name and page number of the transcript.)

Regardless of the reasons for this state of affairs, there is little choice for the individual consumer desiring cable service. He must either pay the rate charged by the cable company serving his area or do without the service. Under these circumstances, local authorities should be able to make the policy determination as to the need for rate regulation.[22] The FCC has long recognized the appropriateness of municipal rate regulation in order to protect the consuming public.[23] Clearly, however, rate regulation is anticompetitive. Absent immunity, it would appear to be a *per se* antitrust violation for a municipality to enter into an agreement with a cable TV operator that establishes a fixed price for services to be provided to the public. In sum, fundamental local government policy decisions, which include rate regulation, granting of a single franchise and requiring community-wide service, are subject to serious challenge under the antitrust laws unless the many municipalities which impose such restrictions enjoy governmental immunity.

C. A Denial Of Broad Municipal Immunity Will, In Practical Terms, Eliminate Municipal Regulation Of Cable TV In Thousands Of Municipalities.

Unless municipal regulations and contractual restrictions are immune from antitrust attack, they will be subject to scrutiny under both a "*per se* violation" analysis

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[22] The desirability of rate regulation does not depend upon the existence of "natural" or "*de facto*" monopoly. Local governments regulate many areas of commercial activity and fix rates even where competition exists, where the service involved is a basic service affected with the public interest. For example, taxicabs and privately owned bus companies are in competition but nonetheless are subject to rate regulation. The functions which cable TV can perform, it can reasonably be argued, are equally affected with the public interest.

[23] *E.g.*, 1972 Report at 3276.

and the Rule of Reason. *See Standard Oil Company* v. *United States,* 221 U.S. 1 (1911). Under the Rule of Reason, each factual situation and regulatory mechanism will require separate evaluation. Under this particularized analysis, granting a single franchise, for example, might be upheld in a particular community context, while a similar scheme might be held invalid in a different factual setting.[24] As a result, the validity of municipal regulations will not be subject to any general principles, but will require extensive case-by-case litigation.

Absent broad municipal immunity, local governments will not be able to run the financial risk of extended litigation and possible liability for treble damages. Indeed, as a practical matter, the ultimate question of liability is immaterial. Without immunity, virtually any cable company can threaten a local government with the prodigious expense involved in merely defending such litigation.[25] The substantial expense incurred by the City of Boulder in defending this case, which is a matter of public record, is not likely to go unheeded by local government officials.

If the standard for municipal antitrust immunity is drawn upon narrow lines which may require case-by-case

[24] In addition, although it is unclear how the Rule of Reason would be applied to a local government, arguably it would require balancing the degree of anticompetitive restrictiveness against the procompetitive effects. This would tend to increase the *ad hoc* nature of decisions in the area.

[25] It is significant that the industry involved, and therefore the class of potential plaintiffs, includes affiliates of major national corporations. See Cablefile/81 (Titsch Publishing, 1981). TCI, the corporate parent of petitioner, is the third largest cable TV operator in the country, with 900,000 subscribers and annual revenues of $55.5 million. Sparkman, March 4, 1980, Tr. 112-13.

evaluation, then municipalities may well be faced with an avalanche of antitrust suits.[26] Absent immunity, each of the municipalities listed in Appendix C, along with numerous other local governments, are likely to be subjected to antitrust litigation.[27] Under such circumstances, no prudent local official would attempt to impose any significant regulations on cable TV. Thus, the existing scheme of municipal regulation of cable television will effectively be destroyed.

Realistically, if there is no *local* regulation, cable TV generally will be unregulated, since the federal government has withdrawn in deference to local discretion, and only a handful of states have acted in the area. As a result, no level of government will be addressing the vital questions of public policy raised by rapidly changing cable television technology and services. Service to the community will be assessed in terms of profitability alone; potentially lucrative areas of a community will be served while other areas are ignored. If a *de facto* monopoly is established, municipalities will have no way to guarantee reliable service at reasonable rates. Consequently, communities throughout the country will be denied the opportunity to ensure that cable communications service is provided in a manner which is consistent with legitimate local concerns.

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[26] Since thousands of municipalities in at least 39 states are potential defendants in the area of cable television alone, this raises a serious question about the capacity of the federal judicial calendar to handle such a volume of complex litigation.

[27] This is not mere speculation. On June 1, 1981, an action was filed by a cable company against two municipalities in Northern California claiming $60,000,000 in antitrust damages. *Televents, Inc.* v. *Martinez,* No. C 81 2376 TEH (N.D. Cal., filed June 12, 1981). See also *TCI Cablevision Inc.* v. *Jefferson City,* No. 81 4054 CV C W (W.D. Mo., filed March 18, 1981).

CONCLUSION

Local government has traditionally played a fundamental role in licensing and regulating cable television service. It is municipal authorities who must resolve important public policy questions which are uniquely local in nature. To deal effectively with the changing and rapidly growing cable television industry, local governments must be free to act without the constant threat of extended antitrust litigation and potential liability for treble damages.

For the reasons set forth herein, the judgment of the Tenth Circuit should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX A

STATE LAWS WHICH PROVIDE FOR CABLE TELEVISION REGULATION PRIMARILY BY STATE AGENCY

Alaska: ALASKA STAT. §42.05(1976).

Connecticut: CONN. GEN. STAT. ANN. §§16-330 through 16-333 (WestSupp. 1981).

*Delaware: DEL. CODE ANN. tit.26(1974).

Hawaii: HAWAII REV. STAT. §440(G)(1976).

Massachusetts: MASS. GEN. LAWS ANN. ch.166A (1979).

Minnesota: MINN. STAT. ANN. §238(WestSupp.1981).

Nevada: NEV. REV. STAT. §711(1980).

New Jersey: N.J. STAT. ANN. §48-5A(WestSupp. 1980).

New York: N.Y. EXEC. LAW. art.28, §811 *et seq.* (McKinney Supp. 1973).

Rhode Island: R.I. GEN. LAWS. ANN. tit.39, §19(1977 Reenactment).

Vermont: VT. STAT. ANN. tit.30, §§501-507(Supp. 1980).

*Delaware provides for state regulation of cable TV in some of its political subdivisions and permits the remaining political subdivisions to regulate it on the basis of traditional broad grants of regulatory authority.

Some of the information in Appendices A and B is derived from Federal Communications Commission, Cable Television State Regulation (June, 1981).

APPENDIX B

STATE LAWS WHICH SPECIFICALLY PROVIDE FOR CABLE TELEVISION REGULATION BY MUNICIPALITIES*

Arizona: ARIZ. REV. STAT. ANN. §§9-505 through 9-508(West1977).

California: CAL. GOV'T. CODE §53066 (1974) (Deering).

Illinois: ILL. REV. STAT. ch.24 §11-42-11 and ch.34 §429.24(WestSupp.1980).

Indiana: IND. CODE §18-1-1.5-13(b),525-36-1(1976).

Iowa: IOWA CODE. ANN. §364.2(West1976).

Kansas: KAN. STAT. ANN. §12-2006, *et seq.*(1975).

Maine: ME. REV. STAT. ANN. tit.30, §§2151(2)(H)(I), 1901(1-B)(1-C)(West1964).

Nebraska: NEB. REV. STAT. §§18-2201 through 2205, §§23-383 through 388(1977 Reissue).

New Hampshire: N.H. REV. STAT. ANN. §53-C:1 through §53-C:5(Supp.1979).

North Carolina: N.C. GEN. STAT. §§160A-319, 311(1976).

South Carolina: S.C. CODE ANN. §58-12-10 *et seq.* (Supp.1980).

South Dakota: S.D. COMP. LAWS ANN. §§9-35-16 through 9-35-23(Supp.1980).

Tennessee: TENN. CODE. ANN. §7-59-101 *et seq.* (1980).

Virginia: VA. CODE. ANN. §§15.1-23.1(1973 Replacement).

West Virginia: W.VA. CODE ANN. §8-31-1,2(1976).

*Alabama has a unique system for regulation of cable TV which does not fit into any of the categories used here. There is specific state legislation, but it involves local bills for each political subdivision seeking to license and regulate cable TV on an individual basis. *E.g.* 1971 Ala. Acts No. 178 regarding Uniontown, Alabama.

APPENDIX C

SAMPLE OF MUNICIPALITIES WHICH HAVE A SINGLE FRANCHISEE AND REQUIRE SERVICE THROUGHOUT THE FRANCHISE AREA UNDER BROAD GRANTS OF AUTHORITY*

APACHE, OKLAHOMA, Ordinance 193 (November 10, 1980).

ATLANTA, GEORGIA, Ordinance 49-77 (1980).

BELOIT, WISCONSIN, City Code ch. 28.

CINCINNATI, OHIO, Ordinance 62 (1981).

CLEARWATER, FLORIDA, Ordinance 2085,2086.

CREVE COEUR, MISSOURI, Ordinance 953.

DALLAS, TEXAS, Ordinance 16738 (November 5, 1980).

HEATH, OHIO, Ordinance 49-77.

JEFFERSON, OREGON, Ordinance 442.

MURRAY, UTAH, Ordinance 698.

NEW ORLEANS, LOUISIANA, Ordinance 7474.

OCEAN CITY, MARYLAND, Ordinance A11001 (1975).

STEAMBOAT SPRINGS, COLORADO, Ordinance 740.

* This brief list is representative of the vast majority of communities in the country which have adopted such franchise provisions.

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In The

Supreme Court of the United States

October Term, 1980

COMMUNITY COMMUNICATIONS COMPANY, INC.,
Petitioner,

vs.

CITY OF BOULDER, COLORADO, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

AMICUS CURIAE BRIEF FOR THE COLORADO MUNICIPAL LEAGUE IN SUPPORT OF THE RESPONDENTS

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QUESTION PRESENTED

Is the City of Boulder's action, restricting petitioner's use of City rights-of-way, immune from attack under the federal antitrust laws?

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1 C. D. Sands, *Sutherland Statutory Construction* § 4.07 (4th ed. 1972) 27

INTEREST OF THE COLORADO MUNICIPAL LEAGUE

The Colorado Municipal League ("League") is a statewide nonprofit association of two hundred thirty-one Colorado cities and towns, including all fifty-six of the home rule municipalities in Colorado. The League is an *amicus curiae* by consent of the parties (signed consent of the parties are on file with the Clerk of this Court), and was an *amicus curiae* during the consideration of this case by the Tenth Circuit Court of Appeals.

Two issues of particular concern to Colorado's municipalities are raised in this lawsuit: will Colorado municipalities be subjected to the significant cost of defending federal antitrust claims and the potentially crippling cost of treble damage judgments for exercising their traditional regulatory powers; and will the constitutional protection from interference by the state legislature, long afforded Colorado's home rule municipalities, be substantially eroded? Related to these two issues is a concern that the threat of antitrust liability or simply fear of the cost of antitrust litigation, could have a chilling effect on the exercise of regulatory authority otherwise necessary to protect the public health, safety and welfare.

Much is made of the fact that the Boulder ordinances at issue involve regulation of a cable television business, and that the Colorado statutes and Constitution do not refer specifically to "cable television." More fundamentally, however, this case involves municipal regulation of the use of public rights-of-way, and particularly the regulation of special uses made of public rights-of-way by private enterprise. During a telephone survey conducted by the League staff in the fall of 1980, some eighty-five Colorado municipalities responded that they had entered into a franchise, license, permit, or other agreement with a cable

television company regarding use of municipal rights-of-way. Ordinances in the League's files indicate that some of these agreements date back to the early 1960's. But cable television companies are not the only businesses seeking special use of public rights-of-way, and it is safe to say that even larger numbers of Colorado municipalities have entered into a franchise, permit, license or other agreement to permit special use of public rights-of-way by other types of businesses, such as electric and gas utilities. The potential impact of any decision in this case could broadly affect municipal regulation of any special use of public rights-of-way, regardless of the specific nature of the business involved.

The League appears as *amicus curiae* in this case to urge this Court to affirm the Tenth Circuit Court of Appeals' decision. The League's brief will focus on Colorado law and the application to Colorado law and to Colorado's municipalities of past opinions of the United States Supreme Court relating to state action antitrust immunity.

STATEMENT OF THE CASE

The League adopts the statement of the case appearing in the brief of the City of Boulder.

SUMMARY OF THE ARGUMENT

The Tenth Circuit's decision should be affirmed. In restricting petitioner's use of City rights-of-way, Boulder exercised either its constitutional home rule powers over local and municipal matters or the statutory powers delegated to it by the Colorado General Assembly. In either event, the City's action met the applicable requirements for state action immunity and is immune from attack under the federal antitrust laws.

ARGUMENT

The City of Boulder's action, restricting petitioner's use of City rights-of-way, is immune from federal antitrust attack.

The Tenth Circuit Court of Appeals ruled in *Community Communications Co. v. City of Boulder,* 630 F. 2d 704, 708 (10th Cir. 1980), *cert. granted,* April 6, 1981, that the City of Boulder's ("City" or "Boulder") action, restricting petitioner's use of the City's rights-of-way for cable television ("CATV") expansion[1] is exempt[2] from the federal antitrust laws. The Tenth Circuit found that the City's action was within the constitutional home rule powers granted it in "local and municipal matters," and met the requirement for state action immunity as set forth in *Parker v. Brown,* 317 U. S. 341 (1943) and most recently in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.,* 445 U. S. 97 (1980). Consequently, the Tenth Circuit reversed the judgment of the trial court, setting aside a temporary restraining order which the trial court issued against the City based on its alleged antitrust violations.

The Tenth Circuit's decision should be affirmed. The City's action was an exercise of its home rule powers or

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[1]Section 3 of the Boulder, Colo., Ordinance No. 4472 (Dec. 18, 1979) and section 1 of Boulder, Colo., Ordinance No. 4473 (Dec. 18, 1979) specifically restrict petitioner from expanding its system *through working in the public rights-of-way* outside certain geographic areas. The key restriction in each ordinance is petitioner's use of the public rights-of-way. (Copies of the Boulder ordinances appear in the appendix to petitioner's application for certiorari, at A-55 through A-65.)

[2]The League will use the term "immunity" instead of "exemption." While somewhat inexact, the term "immunity" is used for convenience, to denote the circumstances under which the federal antitrust laws are not applicable to states and their subdivisions.

its statutory powers.[3] In either event, the action met the applicable requirements for state action immunity.

I. The requirements necessary to establish the City's antitrust immunity depend in part on the source and scope of its power to act.

According to *Parker v. Brown*, 317 U. S. at 350, 351, the Sherman Antitrust Act (15 U. S. C. §§ 1, 2) was intended to prohibit certain anticompetitive acts of private individuals. It was not intended to prohibit restraints imposed by the state as an act of government. *Id.* at 352. Decisions of this Court subsequent to *Parker* set forth principles to apply in deciding whether the action for which immunity is claimed represents a restraint imposed by the state as an act of government, or a private restraint seeking the cloak of state action immunity. *See California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., supra; New Motor Vehicle Board v. Orrin W. Fox Co.*, 439 U. S. 96 (1978); *City of Lafayette v. Louisiana Power & Light Co.*, 435 U. S. 389 (1978); *Bates v. State Bar of Arizona*, 433 U. S. 350 (1977); *Cantor v. Detroit Edison Co.*, 428 U. S. 579 (1976); and *Goldfarb v. Virginia State Bar*, 421 U. S. 773 (1975). The most stringent requirements are imposed upon private individuals, farthest removed from the ultimate body wielding the state's authority in the particular area at issue. Lesser requirements are imposed upon the ultimate body wielding the state's authority in that area. Those requirements may be briefly summarized as follows:

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[3]The League was an *amicus curiae* during the Tenth Circuit Court of Appeals' consideration of this case. The League argued then, as it does here, that the City of Boulder's action is entitled to antitrust immunity whether it was taken pursuant to the City's home rule powers or its statutory powers. The Tenth Circuit did not need to decide the statutory argument after finding that the City was acting pursuant to its constitutional home rule powers.

Where the action for which immunity is claimed is taken by the ultimate body wielding the state's power in the area, the challenged anticompetitive restraint must reflect a clearly articulated and affirmatively expressed policy of that body to displace competition with regulation or monopoly service; and, that body must actively supervise the policy. *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U. S. at 105. *See Bates v. State Bar of Arizona, supra; New Motor Vehicle Board v. Orrin W. Fox Co., supra;* and *Parker v. Brown, supra.*

Where the action for which immunity is claimed is taken by a traditional governmental body exercising powers delegated to it directly by the ultimate body wielding the state's power in the area, the requirements set forth above must be met. However, the policy which must be clearly expressed and actively supervised is that of the ultimate body wielding the state's power in the area, not that of a governmental body exercising the delegated power. *City of Lafayette v. Louisiana Power & Light Co.*, 435 U. S. at 410; and *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U. S. at 105. The necessary policy can be found if, from the authority delegated to operate in a particular area, it is apparent that the ultimate body wielding the state's power contemplated the kind of action complained of. *City of Lafayette v. Louisiana Power & Light Co.*, 435 U. S. at 415.

Where the action for which immunity is claimed is taken by a private individual or by a governmental body exercising only limited governmental functions and having few of the attributes of a governmental entity, the anticompetitive action must be commanded or compelled, not merely contemplated, by the ultimate body wielding

the state's authority in the area. *Cantor v. Detroit Edison Co.*, 428 U. S. at 592-593; and *Goldfarb v. Virginia State Bar*, 421 U. S. at 790-791.

As these principles indicate, the farther removed the person or entity imposing the restraint is from the ultimate body wielding the state's power in the area, the clearer must be that person's or entity's authority to engage in anticompetitive activity. This is consistent with the purpose of the state action immunity: to protect the ability of the state to impose restraints as an act of government. *Parker v. Brown*, 317 U. S. at 350-352.

II. Boulder's action was taken pursuant to its constitutional home rule powers and meets the requirements for immunity set forth in Midcal, Bates, and New Motor Vehicle Board.

By Article XX[4] of the Colorado Constitution, the people of Colorado established Colorado's home rule municipalities as the ultimate bodies wielding the state's power over "local and municipal matters."[5] The citizens of Boulder adopted a home rule charter in 1917, pursuant to Article XX, and the City thereby became the ultimate

[4]See Appendix A of this brief for a copy of the relevant portions of Colorado Constitution, Article XX, as amended through 1981.

[5]Colorado's home rule municipalities do not have broad extraterritorial police powers. They may provide certain services and exercise certain powers beyond their boundaries where authorized by constitution or statute. *See, e. g., Thornton v. Farmers Reservoir & Irrigation Co.*, 194 Colo. 526, 526, 575 P. 2d 382 (1978) (outside city water service); *Fishel v. City and County of Denver*, 106 Colo. 576, 108 P. 2d 236 (1940) (condemnation of property outside boundaries). However, they have no additional police power jurisdiction beyond their boundaries by virtue of their home rule status and must instead rely on any statutory authority. *Robinson v. City of Boulder*, 190 Colo. 357, 362, 547 P. 2d 228, 231 (1976). See *Pueblo v. Flanders*, 122 Colo. 571, 575, 225 P. 2d 832, 834 (1950) (Pueblo is a home rule municipality).

body wielding the state's power over Boulder's local and municipal matters. Since Boulder's action at issue here, restricting petitioner's use of public rights-of-way in Boulder, is a "local and municipal matter" under Article XX, immunity for its action is tested by the first set of requirements described above which are applicable to the ultimate body wielding the state's power in the matter. *See*, in particular, *Bates v. State Bar of Arizona, supra.* Consequently, Boulder's action is immune from antitrust attack if the action reflects a clearly articulated and affirmatively expressed policy of the City to displace competition with regulation, and if the City actively supervises the policy.

A. Boulder is the ultimate body wielding the state's power over Boulder's local and municipal matters.

With the adoption of Colorado Constitution, Article XX, the people of Colorado carved out an exception to the state legislature's control over Colorado municipalities, declaring that the ultimate state authority over "local and municipal matters" in a home rule municipality is that municipality.

Article XX was approved by the people of Colorado and added to the state constitution in 1902.[6] In addition to forming a consolidated city and county of Denver, its purpose was to relieve "municipalities from their dependence on legislative action for their form of organization and power and from the resultant interference in municipal affairs such dependence made possible." Klemme, *The Powers of Home Rule Cities in Colorado*, 36 U. Colo. L. Rev. 321, 324-325 (1964). *See Elder v. Sours*, 31 Colo. 369, 74 P. 167 (1903).

[6]See Appendix B of this brief for a copy of Article XX as originally adopted by the people of Colorado in 1902.

As originally drafted, Article XX granted several enumerated powers to home rule cities. See Appendix B. During the years following 1902, however, controversy arose over the narrow construction Colorado's courts gave to Article XX home rule powers. *Hoper v. City and County of Denver*, 173 Colo. 390, 479 P. 2d 967, 970 (1971). The controversy culminated in 1912 when the people of Colorado, disappointed by the courts' narrowing of Article XX home rule powers, initiated by petition and approved at a state-wide election, a constitutional amendment revising and expanding section 6 of Article XX.[7] *Id. See Tate v. Prevost*, 55 Colo. 199, 134 P. 129 (1913).

The 1912 amendment to section 6 of Article XX expanded the powers granted to home rule municipalities, and increased the protection afforded home rule municipalities from interference by the state legislature in local and municipal matters. Specifically, as initiated and adopted by the people of Colorado, section 6 states:

> The people of each city or town of this State, having a population of two thousand inhabitants . . . are hereby vested with, and they shall always have, power to make, amend, add to or replace the charter of said city or town, which shall be its organic law and extend to all its local and municipal matters.
>
> Such charter and the ordinances made pursuant thereto in such matters shall supersede within the territorial limits and other jurisdiction of said city or town any law of the State in conflict therewith.

After identifying a non-exclusive[8] list of matters specifically deemed to be "local and municipal matters," section 6 continues:

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[7]Appendix A of this brief contains section 6 as it was initiated and adopted by the people of Colorado in 1912.

[8]*See Tate v. Prevost*, 55 Colo. at 215, 134 P. at 134; and *Hoper v. City and County of Denver*, 173 Colo. at 396, 479 P. 2d at 970.

> It is the intention of this article to grant and confirm to the people of all municipalities coming within its provisions the full right of self-government in both local and municipal matters and the enumeration herein of certain powers shall not be construed to deny to such cities and towns, and to the people thereof, any right or power essential or proper to the full exercise of such right.
>
> The statutes of the state of Colorado so far as applicable, shall continue to apply to such cities and towns, except insofar as superseded by the charters of such cities and towns or by ordinance passed pursuant to such charters.

Article XX's radical reallocation of power between the state legislature and home rule municipalities cannot be overstated. Prior to Article XX, Colorado's municipalities had only those powers granted to them by the state legislature, and the legislature had complete control over their organization and existence (so-called "Dillon's Rule"). 1 J. F. Dillon, *Municipal Corporations* § 237 (5th ed. 1911). That relationship remains essentially the same today between Colorado's statutory (non-home rule) municipalities and the state legislature. Under established Colorado law, statutory municipalities "are created by statute, and are confined to the specific powers granted by statute, which must be strictly construed." *Svaldi v. City of Lakewood*, 36 Colo. App. 155, 156, 536 P. 2d 331, 332 (1975) (Lakewood is a statutory city). *Accord, City of Aurora v. Bogue*, 176 Colo. 198, 200, 489 P. 2d 1295, 1296 (1971) (Aurora was a statutory city when this case was brought); and *City of Sheridan v. City of Englewood*, — Colo. —, 609 P. 2d 108 (1980).[9]

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[9]This case graphically illustrates the difference in powers between Colorado's statutory and home rule cities. Sheridan, a statutory city, was found to have no power to levy an amusement tax. However, in the earlier case of *Deluxe Theatres, Inc. v. City of Englewood*, 198 Colo. 85, 596 P. 2d 771 (1979), home rule cities were found to have the power to levy an amusement tax as a "local and municipal matter" under Article XX of the Colorado Constitution.

Particularly since the 1912 amendment, Colorado courts have broadly interpreted and applied the powers granted to home rule municipalities by Article XX, in accordance with the people's intent. Article XX has consistently been interpreted as a grant to home rule municipalities "of *every power* theretofore possessed by the legislature to authorize municipalities to function in local and municipal affairs." *Denver Urban Renewal Authority v. Byrne*, — Colo. —, 618 P. 2d 1374, 1381 (1980), quoting from *Four County Metropolitan District v. Board of County Commissioners*, 149 Colo. 284, 294, 369 P. 2d 67, 72 (1962) (emphasis by the Court); *Lehman v. Denver*, 144 Colo. 109, 355 P. 2d 309 (1960); and *City and County of Denver v. Henry*, 95 Colo. 582, 38 P. 2d 895 (1934). That power is "plenary" in local and municipal matters. *Denver Urban Renewal Authority v. Byrne*, 618 P. 2d at 1380; and *McNichols v. City and County of Denver*, 101 Colo. 316, 323, 74 P. 2d 99, 103 (1937).

Since the 1912 amendment to Article XX, Colorado courts also have consistently applied the Article's requirement that charters or ordinances of home rule municipalities supersede conflicting state statutes. *See, e. g., Security Life and Accident Co. v. Temple*, 177 Colo. 14, 492 P. 2d 63 (1972) (sales and use tax); *State Farm Insurance Co. v. Temple*, 176 Colo. 537, 491 P. 2d 1371 (1971) (occupation tax); *Roosevelt v. City of Englewood*, 176 Colo. 576, 492 P. 2d 65 (1971) (zoning); *Thornton v. Farmers Reservoir & Irrigation Co., supra* note 5 (water condemnation); and *City and County of Denver v. Henry, supra* (traffic regulation).

The language of Article XX and its application by the Colorado courts establish beyond doubt that Colorado's home rule municipalities are the ultimate bodies wielding the state's power in local and municipal matters. What-

ever powers the state General Assembly could have granted to municipalities prior to the adoption of Article XX are granted to those municipalities by that Article. The powers of the state General Assembly in local and municipal matters are subordinated by Article XX to the powers of the state's home rule municipalities.

B. Boulder establishes "state" policy in its own local and municipal matters.

Petitioner and the *amici curiae* state attorneys general argue that Colorado's home rule municipalities are not "separate, sovereign states," that no "state" policy exists in Colorado relative to CATV, and that Boulder cannot establish any "state" policy in connection with CATV regulation. Petitioner's brief at 24 and brief of *amici curiae* at 25. They imply that only the state legislature can express state policy. Their arguments miss the mark, however, reflecting a misunderstanding of the purpose of the *Parker* state action immunity. That purpose is *not* to protect particular machinery of state government from federal intrusion. Rather, it is to protect the *sovereign powers* of the state from such intrusion. *Parker v. Brown,* 317 U. S. at 350-351; and *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.,* 445 U. S. at 104. That purpose cannot be achieved by protecting actions of or policies established by a state legislature only, since some sovereign powers of Colorado are vested in bodies other than just the state legislature. Protection must be afforded actions and policies of that government body in which the sovereign powers of the state are vested, whatever the nature of that body and wherever it may be located in the general governmental structure.

Particularly applicable is *Bates v. State Bar of Arizona, supra.* There the appellant attorneys argued that

an Arizona Supreme Court rule banning attorney advertising violated the Sherman Act. This Court held, however, that the Sherman Act claim was barred by the *Parker* state action immunity. The Court's ruling was founded on its determination that the challenged restraint (ban on attorney advertising) was the affirmative command of the Arizona Supreme Court; that the Arizona Supreme Court was the "ultimate body" wielding the state's sovereign power over the practice of law pursuant to a broad constitutional grant of authority; thus, the restraint was pursuant to "state" policy and directed by the state acting as sovereign.[10] Just as the people of Arizona delegated to the Arizona Supreme Court, through the Arizona Constitution, the sovereign power of the state over the practice of law, the people of Colorado delegated to home rule municipalities, through Article XX of the Colorado Constitution, the sovereign power of the state over local and municipal matters.

The *people* of Colorado are the source of the sovereign power of this state,[11] just as the *people* of Arizona

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[10]In response to petitioner's argument that Boulder is not a "separate, sovereign state," the Arizona Supreme Court certainly is not a "separate, sovereign state" yet it exercises sovereign power granted directly to it by the people of the state. In *Bates*, the Arizona Supreme Court was referred to as the "state" because it exercised the sovereign powers of the state. (The Arizona court rules "reflect a clear articulation of the State's policy . . ." and, through the Court's enforcement proceedings, "the State supervision is . . . active.") 433 U. S. at 362. Similarly, Boulder exercises sovereign powers of the state when acting in "local and municipal matters" under Article XX.

[11]In *State of Texas v. White*, 74 U. S. 700, 720 (1868), the Supreme Court struggled with the definition of "state" and rejected a narrow construction:

> It describes sometimes a people or community of individuals united more or less closely in political relations, inhabiting temporarily or permanently the same country;

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are the source of the state sovereignty granted to the Arizona Supreme Court in *Bates*. Article II of the Colorado Constitution contains the state's "bill of rights." The first two sections of that article establish the people of this state, not the state legislature, as the source of state sovereign powers:

> *Section 1. Vestment of political powers.* All political power is vested in and derived from the people; all government, of right, originates from the people, is founded upon their will only, and is instituted solely for the good of the whole.
>
> *Section 2. People may alter or abolish form of government-proviso.* The people of this state have the sole and exclusive right of governing themselves, as a free sovereign and independent state; and to alter and abolish their constitution and form of government whenever they may deem it necessary to their safety and happiness, provided, such change be not repugnant to the constitution of the United States.

See *Colorado Project—Common Cause v. Anderson*, 178 Colo. 1, 495 P. 2d 220 (1972); and *Johnson v. McDonald*, 97 Colo. 324, 332, 49 P. 2d 1017, 1022 (1935).

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> often it denotes only the country or territorial region, inhabited by such a community; not unfrequently it is applied to the government under which the people live; at other times it represents the combined idea of people, territory, and government.
>
> *It is not difficult to see that in all of these senses the primary conception is that of a people or community. The people, in whatever territory dwelling, either temporarily or permanently, and whether organized under a regular government, or united by looser and less definite relations, constitute the state.* (Emphasis added.)

The Court noted that the United States Constitution used the word "state" in each of the different senses, and in some clauses made a plain distinction between a "state" and "the government of a State." *Id.* at 721. *See also, City and County of Denver v. Stenger*, 295 F. 809, 816 (8th Cir. 1924) ("state" means "all of the people.")

The people of Colorado, through the state constitution, vested portions of their sovereign power in several different entities. The executive power was vested in the governor by the Colorado Constitution, Article IV, section 2. The judicial power was vested in the courts by the Colorado Constitution, Article VI, section 1. The legislative power was vested in the state's General Assembly by the Colorado Constitution, Article V, section 1, but the people specifically reserved from that legislative power, the power to "propose laws and amendments to the constitution and to enact or reject the same at the polls independent of the general assembly. . . ."

Through Article XX of the Colorado Constitution, the home rule amendment, the people exercised the powers they reserved in Article V, section 1[12] and Article II, section 2 and vested their ultimate power over "local and municipal matters" in home rule municipalities. Thus, home rule municipalities exercise the sovereign power of the people of the state and establish "state" policy when acting in local and municipal matters. *See City of Thornton v. Farmers Reservoir and Irrigation Company,* 194 Colo. at 534, 575 P. 2d at 388 (a portion of the state's "sovereignty" was granted directly by the people of Colorado to the citizens of home rule municipalities through the adoption of sections 1 and 6 of Article XX of the Colorado Constitution); and *City and County of Denver v. Stenger,* 295 F. at 815 (Denver exercises the delegated sovereignty of the state in local matters).

In *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.,* 445 U. S. at 103-104, the Court recognized that the *Parker* antitrust exemption "is ground-

[12]See Appendix C of this brief for a copy of Colorado Constitution, Article V, section 1.

ed in our federal structure" and, quoting from *Parker*, the Court said:

> "In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress. . . ." In *Parker v. Brown*, this Court found in the Sherman Act no purpose to nullify state powers.

To hold, as petitioner suggests, that the people's constitutional grant of sovereign powers to home rule municipalities is too broad[13] to provide a basis for any state action immunity would nullify the intent of the people of the state, long-expressed through Article XX, to free home rule municipalities from the control of the state legislature in local and municipal matters (since only the state legislature would be left to declare any state policy for home rule municipalities).[14] On the other hand, application of

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[13]The authority granted home rule municipalities by Article XX of the Colorado Constitution is no more broad than that granted in the Arizona Constitution to the Arizona Supreme Court, as reflected in *Bates v. State Bar of Arizona, supra*. Certainly, there is no specific or even general reference in the Arizona Constitution, Articles III or VI, authorizing the Arizona Supreme Court to ban attorney advertising or "restrict competition" in the practice of law.

[14]Petitioner cites *City and County of Denver v. Tihen*, 77 Colo. 212, 235 P. 777 (1925) and *City and County of Denver v. Sweet*, 138 Colo. 41, 329 P. 2d 441 (1958), for the proposition that the state legislature establishes state policy in Colorado, even as to local and municipal matters. *See*, petitioner's brief at 25, 27. The *Tihen* decision, which has been soundly criticized (see Klemme, 36 U. Colo. L. Rev. at 332), has since been overruled in part (*State Farm Insurance Co. v. Temple, supra*), and limited to situations "outside and beyond Article XX" powers. *Davis v. City and County of Denver*, 140 Colo. 30, 35, 342 P. 2d 674, 676 (1959). It now stands only for the proposition that the state legislature is the ultimate authority over matters of statewide concern, a conclusion which the League does not dispute.

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the state action immunity in this case would, in accord with the purposes of the immunity, prevent nullification of sovereign powers granted to home rule municipalities by the people of Colorado.

C. Regulating the use of public rights-of-way is a local and municipal matter under Article XX.

Regulation of the use of municipal rights-of-way is a local and municipal matter under Article XX, as evidenced by the language of the Article and by court decisions interpreting that language.

Broad authority to regulate the use of public property within home rule municipalities is specifically granted by Article XX, section 1.[15] That section grants home rule municipalities the power to "own, possess, and hold all property, real and personal"; to "assume, manage, and dispose of all trusts in any way connected therewith"; to "purchase, receive, hold, and enjoy or sell and dispose of, real and personal property"; to "manage, sell, lease, or otherwise dispose of [all property received by bequest, gift or donation] in accordance with the terms of the gift, bequest, or trust"; and to "construct, condemn and purchase, purchase, acquire, lease, add to, maintain, conduct, and operate . . . ways local in use and extent, in whole or in part, and everything required therefore [sic]. . . ."

Particularly applicable, however, is Article XX, section 4, which preserves the right of the people of a home rule municipality to approve any "franchise relating to any street, alley or public place" of the municipality.

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The *Sweet* case holds only that "the authority granted to home rule cities by Article XX may be taken away by subsequent amendments to the constitution." *City and County of Denver v. Sweet*, 138 Colo. at 49, 329 P. 2d at 445.

[15]By virtue of section 6 of Article XX, all home rule municipalities are granted the powers set out in sections 1, 4 and 5 of the Article.

This provision of Article XX gives the people of a home rule city "absolute control over the granting of franchises." *Berman v. City and County of Denver*, 120 Colo. 218, 229, 209 P. 2d 754, 760 (1949).[16] While the revocable permit issued to the petitioner by the City does not purport to be a franchise, it has some characteristics similar to a franchise, *i. e.*, granting petitioner certain special rights to occupy the public ways. *See City and County of Denver v. Stenger*, 295 F. at 814.

In addition, Colorado decisions have consistently upheld broad authority in home rule municipalities to determine how municipal property is used. In *McNichols v. City and County of Denver, supra*, the Court held that Denver has the authority under Article XX to donate municipal property to the federal government. In *City and County of Denver v. Hallett*, 34 Colo. 393, 83 P. 1066 (1905), Denver was held to possess the power to provide for the erection of a municipal auditorium, even though an auditorium was "not indispensable to the objects and purposes of the municipality as declared in the twentieth article." *Id.* at 398, 83 P. at 1068. In both cases, the Court stated that the test for determining the local and municipal character of a particular power "is whether the power, if exercised, will promote the general objects and purposes of the municipality. . . ." *McNichols v. City and County of Denver*, 101 Colo. at 324, 74 P. 2d at 103.

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[16]*See also*, Colorado Constitution, Article XXV which gives the state Public Utilities Commission the authority to regulate public utilities within home rule municipalities, but specifically preserves "the power of municipalities to exercise reasonable police and licensing powers," as well as "their power to grant franchises." While cable television is not a public utility within the meaning of Article XXV (*see In re: The Mountain States Telephone and Telegraph Co.*, PUC Decision No. 70749, reprinted at Petitioner's Petition for Writ of Certiorari, A-70), this provision indicates the local nature of municipal licensing powers over public ways. See Appendix F for a copy of Colorado Constitution, Article XXV.

Regulation of the use of city streets also has been repeatedly held to be a matter of local and municipal concern under Article XX. *See, e.g., People v. Hihzniak,* 195 Colo. 427, 479 P. 2d 1131 (1978) (regulating speed limits on city streets is matter of local concern under Article XX); *Pickett v. City of Boulder,* 144 Colo. 387, 356 P. 2d 489 (1960) (provision for stop at flashing red school light is a matter of local concern); and *City and County of Denver v. Henry, supra* (city ordinance regulating traffic at intersections is a matter of local concern which controls over a conflicting state statute). Finally, police power regulations (such as regulations of the use of public rights-of-way, *see* discussion *infra* at section III of this brief) are considered a "local and municipal matter" under Article XX. See *McCormick v. City of Montrose,* 105 Colo. 493, 99 P. 2d 969 (1940); and *City and County of Denver v. Stenger,* 295 F. at 814.

Generally, the question of whether an activity is a local and municipal matter under Article XX "depends upon the inherent nature of [the] activity and the impact or effect which it may have or may not have upon areas outside of the municipality." *Hamilton v. City and County of Denver,* 176 Colo. 6, 13, 490 P. 2d 1289, 1293 (1971). Boulder's regulation of the use of its rights-of-way has primarily a local, rather than statewide, impact. No portion of the City's challenged ordinances applies outside of the corporate limits, and CATV operators and customers outside the City are unaffected by Boulder's activities. The CATV services to be provided by petitioner under its Boulder permit are limited to City residents through the use of City streets. As stated by the Tenth Circuit: "The matter or subject is a local one." *Community Communications Co. v. City of Boulder,* 630 F. 2d at 707.

D. The City's policy of restricting the use of public rights-of-way is clearly articulated and affirmatively expressed, and is actively supervised by the City.

As found by the Tenth Circuit Court of Appeals, Boulder's policy is clearly articulated and affirmatively expressed, and actively supervised by the City. See the discussion in *Community Communications Co. v. City of Boulder*, 630 F. 2d at 708.

E. Recognition of Colorado's municipal home rule powers does not confer automatic immunity upon any municipality.

Petitioner and the *amici* attorneys general suggest that recognition of Boulder's constitutional home rule powers could automatically free thousands of cities across the country from all constraints of the federal antitrust laws. Brief of *amici curiae*, page 6, and petitioner's brief, page 44. Such argument is specious. Boulder does not claim antitrust immunity because of its *status* as a home rule municipality, but because the particular action it took and the power it exercised met every test for immunity required by this Court. Moreover, Boulder's claim to antitrust immunity here is narrowly drawn, based upon the following factors and findings, previously discussed:

1. A specific constitutional grant of authority, directly from the sovereign people of the state, to exercise the full right of self-government in "local and municipal matters" and to supersede any conflicting state statute relating to such matters. These grants make Colorado's home rule municipalities, including Boulder, the ultimate bodies wielding the state's sovereign power over local and municipal matters.

2. A finding that Boulder's action involved a "local and municipal matter" under that constitutional grant of

authority. This finding is made by the courts (not by the city), thus protecting against an abuse of power by home rule municipalities. In making this finding, courts may consider a variety of factors including the potential effect of the action outside the municipality.

3. A finding that the City's action taken under its home rule powers reflects a clearly articulated and affirmatively expressed policy of the City.

4. A finding that such policy is actively supervised by the City itself and is not merely a shield for private anticompetitive conduct.

III. If Boulder's action was taken pursuant to its statutory powers, the action is immune pursuant to principles set forth in Lafayette and Midcal.

Boulder's action, restricting petitioner's use of City rights-of-way, was taken pursuant to its constitutional home rule powers and is immune from antitrust attack for the reasons set forth in section II of this brief. Even if Boulder's action was taken pursuant to its statutory powers only, it is immune from antitrust attack under the principles established in *City of Lafayette v. Louisiana Power & Light Co., supra,* and *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., supra.*

A. Boulder's action was taken pursuant to a state policy to displace competition with regulation in the use of public rights-of-way.

For political subdivisions exercising only powers delegated from the state legislature, the *Lafayette* plurality opinion restricted *Parker* immunity to actions by the subdivision taken "pursuant to state policy to displace competition with regulation . . . ." 435 U. S. at 413. The state policy may be found by demonstrating "from the authority given a governmental entity to operate in a particular area,

that the legislature contemplated the kind of action complained of." *City of Lafayette v. Louisiana Power & Light Co., id.* at 415. No state compulsion of the political subdivision's action is required. *Id.* at 410 n. 40, and 415. Boulder's action, restricting petitioner's use of the City's rights-of-way, is within the contemplation of the state as evidenced by its statutory and constitutional grants of authority to the City.

(1) The state's policy is evidenced through its police power delegations to the City to regulate and prevent certain uses of the public rights-of-way.

Colorado's home rule municipalities have, in addition to their constitutional powers over "local and municipal matters," all the powers granted to statutory (non-home rule) cities, to the extent the statutory powers are not precluded by the particular home rule municipality's charter. *Woolverton v. City and County of Denver,* 146 Colo. 247, 361 P. 2d 982 (1961). *See* Klemme, U. Colo. L. Rev. at 326-327. In fact, most general municipal powers appearing in C. R. S. 1973, title 31 (1977 Repl. Vol.) (which contains the basic municipal grants of authority) are granted to "municipalities," a term defined in C. R. S. 1973, 31-1-101 (6) (1977 Repl. Vol.) to include specifically home rule municipalities.

Boulder's grant of a revocable permit to petitioner, and the City's subsequent restriction on petitioner's use of the public rights-of-way, rest upon the City's clear authority to regulate and restrict the use of public streets, alleys and other public places. *See* C. R. S. 1973, 31-15-702 (1977 Repl. Vol.). Specifically, 31-15-702 (1) (a) (I), (II) and (VI) grant the governing body of each "municipality" the power:

> (a) (I) To lay out, establish, open, alter, widen, extend, grade, pave, or otherwise improve streets, parks, and public grounds . . . ; to regulate the use of the same; to prevent and remove encroachments or obstructions upon the same . . . ;
>
> (II) To regulate the openings therein for the laying-out of gas or water mains and pipes, the building and repairing of sewers, tunnels, and drains, and the erecting of utility poles . . . ;
>
> (VI) To regulate and prevent the use of streets, parks, and public grounds for signs, signposts, awnings, awning posts, and power and communication poles. . . .

Each state grant of authority contemplates municipal regulation of the use of public rights-of-way and the prevention of physical facilities encroaching into the public streets, parks, and other public ways. Certainly the legislature did not contemplate free market competition in the use of public rights-of-way for the physical facilities of private enterprise. In fact, the protection of the public health and safety in the use of the public streets, sidewalks, and other areas demands displacement of competition with regulation of such use.

While the above statutes do not specifically mention CATV, they are broadly written, intending to anticipate technological changes over time and to permit regulation of *any* use of the public rights-of-way, regardless of its specific nature. Their timelessness is evidenced by the fact that they remain essentially similar to the original grant of street and right-of-way authority to municipalities in 1877,[17] one hundred and four years ago. However,

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[17] C. R. S. 1973, 31-15-702 (1977 Repl. Vol.) originated in the General Laws of Colorado, adopted in 1877 during the first session of the Colorado General Assembly held after statehood. See Appendix D for a copy of the original grant of authority now contained in that section.

two changes of particular interest in this case, broadening the statutory references, occurred in 1975 when all the municipal laws contained in title 31 were recodified. During that recodification, C. R. S. 1973, 31-15-702(1)(a)(II) (1977 Repl. Vol.), was broadened to allow municipal regulation of the "erecting of utility poles" (rather than merely "gas lights"); and 31-15-702 (1) (a) (VI) was broadened to allow municipalities to regulate and prevent the use of streets, parks, and public grounds for "power and communication poles" (rather than merely "telegraph poles"). Compare C. R. S. 1973, 31-12-101 (20) (a), (b) and (f),[18] with C. R. S. 1973, 31-15-702(1)(a)(I), (II) and (VI) (1977 Repl. Vol.) (which reflects title 31 after the recodification in 1975).

Other statutory and constitutional provisions reinforce the conclusion that the state contemplates displacement of competition with regulation in the use of municipal streets and rights-of-way. C. R. S. 1973, 31-15-501(1)-(c) (1977 Repl. Vol.) grants municipalities the general power to license and regulate businesses, thus contemplating some municipal restriction on the operation of market forces. The provisions of Colorado Constitution, Article XX, section 4 and Article XXV,[19] and C. R. S. 1973, 31-32-101—105 (1977 Repl. Vol.) also contemplate that municipalities will substitute regulation for competition as to services which typically would seek a franchise or similar rights to make special use of the public streets. Colorado Constitution, Article XX, section 4 contemplates power in home rule municipalities to grant franchises for the use of "any street, alley or public place," but only upon ap-

[18]A copy of C. R. S. 1973, 31-12-101 (20) (a), (b) and (f) as they existed prior to the 1975 recodification, is contained in Appendix E of this brief.

[19]A copy of Article XXV is contained in Appendix F of this brief.

proval of the franchise at an election. Denial of a franchise thus is a recognized possibility under the constitutional language. Article XXV, adopted in 1954 to transfer regulatory powers over public utilities from home rule municipalities to the state's Public Utilities Commission, expressly preserves "the power of municipalities to exercise reasonable police and licensing power, [and] their power to grant franchises." C. R. S. 1973, 31-15-101 (2) (1977 Repl. Vol.) grants municipalities every power necessary or convenient to the exercise of the specifically granted statutory powers (such as the power to regulate and control the use of the public streets and other public places). Finally, C. R. S. 1973, 43-2-124, as amended, and C. R. S. 1973, 43-2-135[20] vest full jurisdiction, responsibility, and control over municipal streets and rights-of-way (whether or not part of the state highway system) in municipalities. Similar authority granted to counties over county roads has been interpreted as granting to the local government the "sole right to authorize and control the use of the highway. . . . " *Lewis v. Lorenz,* 144 Colo. 23, 26, 354 P. 2d 1008, 1010 (1960).

Under settled Colorado law, the authority to regulate use of public streets and rights-of-way is part of the municipality's police power. In *City of Lakewood v. Haase,* 198 Colo. 47, 596 P. 2d 392 (1979), a statutory (non-home rule) city required that a more limited purpose government (a special district providing water and sanitation service only) obtain a permit from the City prior to effecting a street cut to repair the district's water lines. The Colorado Supreme Court upheld the City's permit requirement, stating that

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[20]A copy of C. R. S. 1973, 43-2-135 and 43-2-124 is contained in Appendix G of this brief.

> " . . . as between the proprietary powers given to the District and the police power to protect its citizens and streets given to the City, the police power prevails." *Id.*, 596 P. 2d at 394.

See City and County of Denver v. Stenger, 295 F. at 814 (Denver has the power to deny a special use of its streets or to grant under terms and compensation agreeable to the City; that power is a police power and compensation therefor is in the nature of a rental). And in *Packard v. Banton*, 264 U. S. 140, 144 (1924), the Supreme Court recognized broad authority for government regulation of use of the streets:

> The streets belong to the public and are primarily for the use of the public in the ordinary way. Their use for the purposes of gain is special and extraordinary and generally at least, may be prohibited or conditioned as the legislature deems proper.

Certainly the exercise by a municipality of its police power authority to regulate the use of the public streets, alleys and other public places, to prevent encroachments and obstructions therein, to regulate the erecting of utility poles therein, and to regulate and prevent the use of streets for power and communication poles is pursuant to long and clearly expressed state policy to displace competition with regulation in the use of the public streets and rights-of-way. Moreover, actions to grant, deny, or suspend permits to make special use of the public streets are contemplated within the statutory and constitutional police power grants of authority previously cited.

(2) Police power delegations sufficiently express state policy to displace competition with regulation.

In his dissent in *City of Lafayette v. Louisiana Power & Light Co.*, at 434-435, Justice Stewart (joined by Jus-

tice White, Justice Blackmun, and Justice Rehnquist) expressed concern that the Court's plurality opinion would result in "an extraordinary intrusion into the operation of state and local government in this country":

> Under our federal system, a State is generally free to allocate its governmental power to its political subdivisions as it wishes. A State may decide to permit its municipalities to exercise its police power without having to obtain approval of each law from the legislature. Such local self-government serves important state interests. It allows a state legislature to devote more time to statewide problems without being burdened with purely local matters and allows municipalities to deal quickly and flexibly with local problems. But today's decision, by demanding extensive legislative control over municipal action, will necessarily diminish the extent to which a State can share its powers with autonomous local governmental bodies.

The fears expressed by Justice Stewart will ripen into fact if this Court adopts a narrow view of antitrust immunity for police power-based municipal regulations. Certainly the Colorado statutes do not mention, and could not mention, every specific action which a municipality might take to exercise control over its public streets and which might have an anticompetitive effect. Nor do the Colorado statutes mention specifically, nor could they mention, every business which may wish to make a special use of the public streets and thus be subject to regulation. Yet exercises of the police power often have an anticompetitive effect (*i.e.*, denying a rezoning, prohibiting the location of businesses in other than established business zone districts, licensing businesses, granting or denying building permits or subdivision plats, granting or denying franchises, licenses or permits for special uses of the public streets, and so forth) and may subject mu-

nicipalities to costly antitrust litigation, the mere defense of which presents a financial and administrative burden to the community and its officials and may inhibit necessary exercises of the power.

Broad legislative grants do not exist only with respect to control over municipal streets. Rather, the great majority of the police powers granted to Colorado's municipalities have been and remain broadly worded grants of authority. See, *e.g.*, the general powers granted in C. R. S. 1973, 31-15-101 through 31-15-902 (1977 Repl. Vol.); the grant of municipal zoning powers in C. R. S. 1973, 31-23-301 through 31-23-313 (1977 Repl. Vol.) (which have remained much the same as originally adopted by the General Assembly in 1923, *see* 1923 Colo. Sess. Laws 649-655); and the grant of municipal subdivision powers in C. R. S. 1973, 31-23-201 through 31-23-226 (1977 Repl. Vol.) (which have remained much the same as originally adopted by the General Assembly in 1929, *see* 1929 Colo. Sess. Laws 219-241). These broad delegations of police power authority to Colorado's municipalities reflect the historical view of the courts that the standards required for delegating state authority to administrative or executive agencies do *not* apply to state delegations of regulatory authority to municipalities. 1 C. D. Sands, *Sutherland Statutory Construction* § 4.07, p. 80 (4th ed. 1972).

Any requirement of greater specificity in delegations of police power authority would in fact cause great disruption in traditional state and local government divisions of regulatory responsibility, and would have a chilling effect on municipal exercise of regulatory powers under historically broad grants of authority.

B. The state's policy is clearly articulated and affirmatively expressed, and is actively supervised by the state directly and through its municipal agents.

The previously cited statutes and constitutional provisions clearly articulate and affirmatively express a state policy for regulating and even preventing some uses of municipal streets and rights-of-way. That policy is actively supervised by the state directly and through its municipal agents.

The state contemplates the enforcement of street controls and regulations by municipalities, as agents of the state for enforcement purposes. *See City of Lafayette v. Louisiana Power & Light Co.*, 435 U. S. at n. 40, 411. Pursuant to C. R. S. 1973, 31-16-101 (1977 Repl. Vol.), municipalities are authorized to enforce obedience to any municipal ordinance by a fine not to exceed three hundred dollars, or ninety days in jail, or both such penalties. Statutes and constitutional provisions, previously discussed, relating to issuance of franchises, licenses and permits for special business uses of public streets, clearly contemplate denial, revocation or suspension of the franchises, licenses or permits under appropriate circumstances. Moreover, the state ensures that individuals potentially injured by a municipal ordinance may test its legality in the state courts through a declaratory judgment proceeding which specifically permits review of municipal ordinances. C. R. S. 1973, 13-51-105 through 13-51-115; and Colo. R. Civ. P. 57. And of course, the state legislature may remove or limit a statutory municipality's power to regulate or prevent the use of its public streets and rights-of-way.

Thus, Boulder's action, restricting petitioner's use of the City's rights-of-way, meets each of the relevant requirements for a state action immunity as set forth in *Lafayette* and *Midcal:* it is taken pursuant to a state policy to displace competition with regulation in the use of public rights-of-way; the state's policy is clearly articulated and affirmatively expressed; and the policy is actively supervised by the state directly and through its municipal agents.

CONCLUSION

Based upon the foregoing, Boulder's action restricting petitioner's use of City rights-of-way is immune from antitrust attack and the decision of the Tenth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX A

COLORADO CONSTITUTION ARTICLE XX, AS AMENDED THROUGH 1981

ARTICLE XX

HOME RULE CITIES AND TOWNS

Section 1. Incorporated. The municipal corporation known as the city of Denver and all municipal corporations and that part of the quasi-municipal corporation known as the county of Arapahoe, in the state of Colorado, included within the exterior boundaries of the said city of Denver as the same shall be bounded when this amendment takes effect, are hereby consolidated and are hereby declared to be a single body politic and corporate, by the name of the "City and County of Denver". By that name said corporation shall have perpetual succession, and shall own, possess, and hold all property, real and personal, theretofore owned, possessed, or held by the said city of Denver and by such included municipal corporations, and also all property, real and personal, theretofore owned, possessed, or held by the said county of Arapahoe, and shall assume, manage, and dispose of all trusts in any way connected therewith; shall succeed to all the rights and liabilities, and shall acquire all benefits and shall assume and pay all bonds, obligations, and indebtedness of said city of Denver and of said included municipal corporations and of the county of Arapahoe; by that name may sue and defend, plead and be impleaded, in all courts and places, and in all matters and proceedings; may have and use a common seal and alter the same at pleasure; may purchase, receive, hold, and enjoy or sell and dispose of, real and personal property; may receive bequests, gifts, and dona-

tions of all kinds of property, in fee simple, or in trust for public, charitable, or other purposes; and do all things and acts necessary to carry out the purposes of such gifts, bequests, and donations, with power to manage, sell, lease, or otherwise dispose of the same in accordance with the terms of the gift, bequest, or trust; shall have the power, within or without its territorial limits, to construct, condemn and purchase, purchase, acquire, lease, add to, maintain, conduct, and operate water works, light plants, power plants, transportation systems, heating plants, and any other public utilities or works or ways local in use and extent, in whole or in part, and everything required therefor, for the use of said city and county and the inhabitants thereof, and any such systems, plants, or works or ways, or any contracts in relation or connection with either, that may exist and which said city and county may desire to purchase, in whole or in part, the same or any part thereof may be purchased by said city and county which may enforce such purchase by proceedings at law as in taking land for public use by right of eminent domain, and shall have the power to issue bonds upon the vote of the taxpaying electors, at any special or general election, in any amount necessary to carry out any of said powers or purposes, as may by the charter be provided.

The provisions of section 3 of article XIV of this constitution and the general annexation and consolidation statutes of the state relating to counties shall apply to the city and county of Denver. Any contiguous town, city, or territory hereafter annexed to or consolidated with the city and county of Denver, under any such laws of this state, in whatsoever county the same may be at the time, shall be detached per se from such other county

and become a municipal and territorial part of the city and county of Denver, together with all property thereunto belonging.

The city and county of Denver shall alone always constitute one judicial district of the state.

[Annexation requirements for the City and County of Denver have been omitted.]

Section 2. Officers. The officers of the city and county of Denver shall be such as by appointment or election may be provided for by the charter; and the jurisdiction, term of office, duties and qualifications of all such officers shall be such as in the charter may be provided; but the charter shall designate the officers who shall, respectively, perform the acts and duties required of county officers to be done by the constitution or by the general law, as far as applicable. If any officer of said city and county of Denver shall receive any compensation whatever, he or she shall receive the same as a stated salary, the amount of which shall be fixed by the charter, or, in the case of officers not in the classified civil service, by ordinance within limits fixed by the charter, and paid out of the treasury of the city and county of Denver in equal monthly payments; provided, however, no elected officer shall receive any increase or decrease in compensation under any ordinance passed during the term for which he was elected.

Section 3. Transfer of government. Immediately upon the canvass of the vote showing the adoption of this amendment, it shall be the duty of the governor of the state to issue his proclamation accordingly, and thereupon the city of Denver, and all municipal corporations and that

part of the county of Arapahoe within the boundaries of said city, shall merge into the city and county of Denver, and the terms of office of all officers of the city of Denver and of all included municipalities and of the county of Arapahoe shall terminate; except, that the then mayor, auditor, engineer, council (which shall perform the duties of a board of county commissioners), police magistrate, chief of police and boards, of the city of Denver shall become, respectively, said officers of the city and county of Denver, and said engineer shall be ex officio surveyor and said chief of police shall be ex officio sheriff of the city and county of Denver; and the then clerk and ex officio recorder, treasurer, assessor and coroner of the county of Arapahoe, and the justices of the peace and constables holding office within the city of Denver, shall become, respectively, said officers of the city and county of Denver, and the district attorney shall also be ex officio attorney of the city and county of Denver. The foregoing officers shall hold the said offices as above specified only until their successors are duly elected and qualified as herein provided for; except that the then district judges, county judge and district attorney shall serve their full terms, respectively, for which elected. The police and firemen of the city of Denver, except the chief of police as such, shall continue severally as the police and firemen of the city and county of Denver until they are severally discharged under such civil service regulations as shall be provided by the charter; and every charter shall provide that the department of fire and police and the department of public utilities and works shall be under such civil service regulations as in said charter shall be provided.

Section 4. First charter. The charter and ordinances of the city of Denver as the same shall exist when this

amendment takes effect, shall, for the time being only, and as far as applicable, be the charter and ordinances of the city and county of Denver; but the people of the city and county of Denver are hereby vested with and they shall always have the exclusive power in the making, altering, revising or amending their charter and, within ten days after the proclamation of the governor announcing the adoption of this amendment the council of the city and county of Denver shall, by ordinance, call a special election, to be conducted as provided by law, of the qualified electors in said city and county of Denver, for the election of twenty-one taxpayers who shall have been qualified electors within the limits thereof for at least five years, who shall constitute a charter convention to frame a charter for said city and county in harmony with this amendment. Immediately upon completion, the charter so framed, with a prefatory synopsis, shall be signed by the officers and members of the convention and delivered to the clerk of said city and county who shall publish the same in full, with his official certification, in the official newspaper of said city and county, three times, and a week apart, the first publication being with the call for a special election, at which the qualified electors of said city and county shall by vote express their approval or rejection of the said charter. If the said charter shall be approved by a majority of those voting thereon, then two copies thereof (together with the vote for and against) duly certified by the said clerk, shall, within ten days after such vote is taken, be filed with the secretary of state, and shall thereupon become and be the charter of the city and county of Denver. But if the said charter be rejected, then, within thirty days thereafter, twenty-one members of a new char-

ter convention shall be elected at a special election to be called as above in said city and county, and they shall proceed as above to frame a charter, which shall in like manner and to the like end be published and submitted to a vote of said voters for their approval or rejection. If again rejected, the procedure herein designated shall be repeated (each special election for members of a new charter convention being within thirty days after each rejection) until a charter is finally approved by a majority of those voting thereon, and certified (together with the vote for and against) to the secretary of state as aforesaid, whereupon it shall become the charter of the said city and county of Denver and shall become the organic law thereof, and supersede any existing charters and amendments thereof. The members of each of said charter conventions shall be elected at large; and they shall complete their labors within sixty days after their respective election.

Every ordinance for a special election of charter convention members shall fix the time and place where the convention shall be held, and shall specify the compensation, if any, to be paid the officers and members thereof, allowing no compensation in cases of non-attendance or tardy attendance, and shall fix the time when the vote shall be taken on the proposed charter, to be not less than thirty days nor more than sixty days after its delivery to the clerk. The charter shall make proper provision for continuing, amending or repealing the ordinances of the city and county of Denver.

All expenses of charter conventions shall be paid out of the treasury upon the order of the president and sec-

retary thereof. The expenses of elections for charter conventions and of charter votes shall be paid out of the treasury upon the order of the council.

No franchise relating to any street, alley or public place of the said city and county shall be granted except upon the vote of the qualified taxpaying electors, and the question of its being granted shall be submitted to such vote upon deposit with the treasurer of the expense (to be determined by said treasurer) of such submission by the applicant for said franchise. The council shall have power to fix the rate of taxation on property each year for city and county purposes.

Section 5. New charters, amendments or measures. The citizens of the city and county of Denver shall have the exclusive power to amend their charter or to adopt a new charter, or to adopt any measure as herein provided;

It shall be competent for qualified electors in number not less than five percent of the next preceding gubernatorial vote in said city and county to petition the council for any measure, or charter amendment, or for a charter convention. The council shall submit the same to a vote of the qualified electors at the next general election not held within thirty days after such petition is filed; whenever such petition is signed by qualified electors in number not less than ten percent of the next preceding gubernatorial vote in said city and county, with a request for a special election, the council shall submit it at a special election to be held not less than thirty nor more than sixty days from the date of filing the petition; provided, that any question so submitted at a special election shall not again be submitted at a special election within two

years thereafter. In submitting any such charter, charter amendment or measure, any alternative article or proposition may be presented for the choice of the voters, and may be voted on separately without prejudice to others. Whenever the question of a charter convention is carried by a majority of those voting thereon, a charter convention shall be called through a special election ordinance as provided in section four (4) hereof, and the same shall be constituted and held and the proposed charter submitted to a vote of the qualified electors, approved or rejected, and all expenses paid as in said section provided.

The clerk of the city and county shall publish, with his official certification, for three times, a week apart, in the official newspapers, the first publication to be with his call for the election, general or special, the full text of any charter, charter amendment, measure, or proposal for a charter convention, or alternative article or proposition, which is to be submitted to the voters. Within ten days following the vote the said clerk shall publish once in said newspaper the full text of any charter, charter amendment, measure, or proposal for a charter convention, or alternative article or proposition, which shall have been approved by majority of those voting thereon, and he shall file with the secretary of state two copies thereof (with the vote for and against) officially certified by him, and the same shall go into effect from the date of such filing. He shall also certify to the secretary of state, with the vote for and against, two copies of every defeated alternative article or proposition, charter, charter amendment, measure or proposal for a charter convention. Each charter shall also provide for a reference upon proper petition therefor, of measures passed by the council to a

vote of the qualified electors, and for the initiative by the qualified electors of such ordinances as they may by petition request.

The signatures to petitions in this amendment mentioned need not all be on one paper. Nothing herein or elsewhere shall prevent the council, if it sees fit, from adopting automatic vote registers for use at elections and references.

No charter, charter amendment or measure adopted or defeated under the provisions of this amendment shall be amended, repealed or revived, except by petition and electoral vote. And no such charter, charter amendment or measure shall diminish the tax rate for state purposes, fixed by act of the general assembly, or interfere in any wise with the collection of state taxes.

The city council, or board of trustees, or other body in which the legislative powers of any home rule city or town may then be vested, on its own initiative, may submit any measure, charter amendment, or the question whether or not a charter convention shall be called, at any general or special state or municipal election held not less than 30 days after the effective date of the ordinance or resolution submitting such question to the voters.

Section 6. Home rule for cities and towns. The people of each city or town of this state, having a population of two thousand inhabitants as determined by the last preceding census taken under the authority of the United States, the state of Colorado or said city or town, are hereby vested with, and they shall always have, power to make, amend, add to or replace the charter of said city

or town, which shall be its organic law and extend to all its local and municipal matters.

Such charter and the ordinances made pursuant thereto in such matters shall supersede within the territorial limits and other jurisdiction of said city or town any law of the state in conflict therewith.

Proposals for charter conventions shall be submitted by the city council or board of trustees, or other body in which the legislative powers of the city or town shall then be vested, at special elections, or at general, state or municipal elections, upon petition filed by qualified electors, all in reasonable conformity with section 5 of this article, and all proceedings thereon or thereafter shall be in reasonable conformity with sections 4 and 5 of this article.

From and after the certifying to and filing with the secretary of state of a charter framed and approved in reasonable conformity with the provisions of this article, such city or town, and the citizens thereof, shall have the powers set out in sections 1, 4 and 5 of this article, and all other powers necessary, requisite or proper for the government and administration of its local and municipal matters, including power to legislate upon, provide, regulate, conduct and control:

a. The creation and terms of municipal officers, agencies and employments; the definition, regulation and alteration of the powers, duties, qualifications and terms or tenure of all municipal officers, agents and employees;

b. The creation of police courts; the definition and regulation of the jurisdiction, powers and duties thereof,

and the election or appointment of police magistrates therefor;

c. The creation of municipal courts; the definition and regulation of the jurisdiction, powers and duties thereof, and the election or appointment of the officers thereof;

d. All matters pertaining to municipal elections in such city or town, and to electoral votes therein on measures submitted under the charter or ordinances thereof, including the calling or notice and the date of such election or vote, the registration of voters, nominations, nomination and election systems, judges and clerks of election, the form of ballots, balloting, challenging, canvassing, certifying the result, securing the purity of elections, guarding against abuses of the elective franchise, and tending to make such elections or electoral votes non-partisan in character;

e. The issuance, refunding and liquidation of all kinds of municipal obligations, including bonds and other obligations of park, water and local improvement districts;

f. The consolidation and management of park or water districts in such cities or towns or within the jurisdiction thereof; but no such consolidation shall be effective until approved by the vote of a majority, in each district to be consolidated, of the qualified electors voting therein upon the question;

g. The assessment of property in such city or town for municipal taxation and the levy and collection of taxes thereon for municipal purposes and special assessments for local improvements; such assessments, levy and col-

lection of taxes and special assessments to be made by municipal officials or by the county or state officials as may be provided by the charter;

h. The imposition, enforcement and collection of fines and penalties for the violation of any of the provisions of the charter, or of any ordinance adopted in pursuance of the charter.

It is the intention of this article to grant and confirm to the people of all municipalities coming within its provisions the full right of self-government in both local and municipal matters and the enumeration herein of certain powers shall not be construed to deny such cities and towns, and to the people thereof, any right or power essential or proper to the full exercise of such right.

The statutes of the state of Colorado, so far as applicable, shall continue to apply to such cities and towns, except insofar as superseded by the charters of such cities and towns or by ordinance passed pursuant to such charters.

All provisions of the charters of the city and county of Denver and the cities of Pueblo, Colorado Springs and Grand Junction, as heretofore certified to and filed with the secretary of state, and of the charter of any other city heretofore approved by a majority of those voting thereon and certified to and filed with the secretary of state, which provisions are not in conflict with this article, and all elections and electoral votes heretofore had under and pursuant thereto, are hereby ratified, affirmed and validated as of their date.

Any act in violation of the provisions of such charter or of any ordinance thereunder shall be criminal and pun-

ishable as such when so provided by any statute now or hereafter in force.

The provisions of this section 6 shall apply to the city and county of Denver.

This article shall be in all respects self-executing.

Section 7. City and county of Denver single school district - consolidations. The city and county of Denver shall alone always constitute one school district, to be known as District No. 1, but its conduct, affairs and business shall be in the hands of a board of education consisting of such numbers, elected in such manner as the general school laws of the state shall provide, and until the first election under said laws of a full board of education which shall be had at the first election held after the adoption of this amendment, all the directors of school district No. 1, and the respective presidents of the school boards of school districts Nos. 2, 7, 17 and 21, at the time this amendment takes effect, shall act as such board of education, and all districts or special charters now existing are hereby abolished.

The said board of education shall perform all the acts and duties required to be performed for said district by the general laws of the state. Except as inconsistent with this amendment, the general school laws of the state shall, unless the context evinces a contrary intent, be held to extend and apply to the said "District No. 1".

Upon the annexation of any contiguous municipality which shall include a school district or districts or any part of a district, said school district or districts or part shall be merged in said "District No. 1", which shall then own all the property thereof, real and personal, located within

the boundaries of such annexed municipality, and shall assume and pay all the bonds, obligations and indebtedness of each of the said included school districts, and a proper proportion of those of partially included districts.

Provided, however, that the indebtedness, both principal and interest, which any school district may be under at the time when it becomes a part, by this amendment or by annexation, of said "District No. 1", shall be paid by said school district so owing the same by a special tax to be fixed and certified by the board of education to the council which shall levy the same upon the property within the boundaries of such district, respectively, as the same existed at the time such district becomes a part of said "District No. 1", and in case of partially included districts such tax shall be equitably apportioned upon the several parts thereof.

Section 8. Conflicting constitutional provisions declared inapplicable. Anything in the constitution of this state in conflict or inconsistent with the provisions of this amendment is hereby declared to be inapplicable to the matters and things by this amendment covered and provided for.

Section 9. Procedure and requirements for adoption. (1) Notwithstanding any provision in sections 4, 5, and 6 of this article to the contrary, the qualified electors of each city and county, city, and town of the state are hereby vested with the power to adopt, amend, and repeal a home rule charter.

(2) The general assembly shall provide by statute procedures under which the qualified electors of any pro-

posed or existing city and county, city, or town may adopt, amend, and repeal a municipal home rule charter. Action to initiate home rule shall be by petition, signed by not less than five percent of the qualified electors of the proposed or existing city and county, city, or town, or by proper ordinance by the city council or board of trustees of a town, submitting the question of the adoption of a municipal home rule charter to the qualified electors of the city and county, city, or town. No municipal home rule charter, amendment thereto, or repeal thereof, shall become effective until approved by a majority of the qualified electors of such city and county, city, or town voting thereon. A new city or town may acquire home rule status at the time of its incorporation.

(3) The provisions of this article as they existed prior to the effective date of this section, as they relate to procedures for the initial adoption of home rule charters and for the amendment of existing home rule charters, shall continue to apply until superseded by statute.

(4) It is the purpose of this section to afford to the people of all cities, cities and counties, and towns the right to home rule regardless of population, period of incorporation, or other limitation, and for this purpose this section shall be self-executing. It is the further purpose of this section to facilitate adoption and amendment of home rule through such procedures as may hereafter be enacted by the general assembly.

APPENDIX B

COLORADO CONSTITUTION ARTICLE XX AS ORIGINALLY ADOPTED IN 1902

ARTICLE XX.

CITY AND COUNTY OF DENVER.

INCORPORATION.

Section 1. The municipal corporation known as the city of Denver, and all municipal corporations and that part of the quasi-municipal corporation known as the county of Arapahoe, in the State of Colorado, included within the exterior boundaries of the said city of Denver as the same shall be bounded when this amendment takes effect, are hereby consolidated and are hereby declared to be a single body politic and corporate, by the name of the "City and County of Denver." By that name said corporation shall have perpetual succession, and shall own, possess and hold all property, real and personal, theretofore owned, possessed or held by the said city of Denver and by such included municipal corporations, and also all property, real and personal, theretofore owned, possessed or held by the said county of Arapahoe, and shall assume, manage and dispose of all trusts in any way connected therewith; shall succeed to all the rights and liabilities, and shall acquire all benefits, and shall assume and pay all bonds, obligations and indebtedness of said city of Denver and of said included municipal corporations and of the county of Arapahoe; by that name may sue and defend, plead and be impleaded, in all courts and places, and in all matters and proceedings; may have and use a common seal and alter the same at pleasure; may purchase, receive, hold and enjoy, or sell and dispose of, real and personal property; may receive

bequests, gifts, and donations of all kinds of property, in fee simple, or in trust for public, charitable or other purposes; and do all things and acts necessary to carry out the purposes of such gifts, bequests and donations, with power to manage, sell, lease or otherwise dispose of the same in accordance with the terms of the gift, bequest or trust; shall have the power, within or without its territorial limits, to construct, condemn and purchase, purchase, acquire, lease, add to, maintain, conduct and operate, water works, light plants, power plants, transportation systems, heating plants, and any other public utilities or works or ways local in use and extent, in whole or in part, and everything required therefor, for the use of said city and county and the inhabitants thereof, and any such systems plants or works or ways, or any contracts in relation or connection with either, that may exist and which said city and county may desire to purchase, in whole or in part, the same or any part thereof may be purchased by said city and county which may enforce such purchase by proceedings at law as in taking land for public use by right of eminent domain, and shall have the power to issue bonds upon the vote of the taxpaying electors, at any special or general election, in any amount necessary to carry out any of said powers or purposes, as may by the charter be provided.

The general annexation and consolidation statutes of the state shall apply to the city and county of Denver to the same extent and in the same manner that they would apply to the city of Denver if it were not merged, as in this amendment provided, into the city and county of Denver. Any contiguous town, city or territory hereafter annexed to or consolidated with the city and county

of Denver, under any of the laws of this state, in whatsoever county the same may be at the time, shall be detached per se from such other county and become a municipal and territorial part of the city and county of Denver, together with all property thereunto belonging.

The city and county of Denver shall alone always constitute one judicial district of the state.

OFFICERS.

Sec. 2. The officers of the city and county of Denver shall be such as by appointment or election may be provided for by the charter; and the jurisdiction, term of office, duties and qualifications of all such officers shall be such as in the charter may be provided; but every charter shall designate the officers who shall, respectively, perform the acts and duties required of county officers to be done by the constitution or by the general law, as far as applicable. If any officer of said city and county of Denver shall receive any compensation whatever, he or she shall receive the same as a stated salary, the amount of which shall be fixed by the charter, and paid out of the treasury of the city and county of Denver in equal monthly payments.

Sec. 3. Immediately upon the canvass of the vote showing the adoption of this amendment, it shall be the duty of the governor of the state to issue his proclamation accordingly, and thereupon the city of Denver, and all municipal corporations and that part of the county of Arapahoe within the boundaries of said city, shall merge into the city and county of Denver, and the terms of office of all officers of the city of Denver and of all included municipalities and of the county of Arapahoe shall

terminate; except, that the then mayor, auditor, engineer, council (which shall perform the duties of a board of county commissioners), police magistrate, chief of police and boards, of the city of Denver shall become, respectively, said officers of the city and county of Denver, and said engineer shall be ex officio surveyor and said chief of police shall be ex officio sheriff of the city and county of Denver; and the then clerk and ex officio recorder, treasurer, assessor and coroner of the county of Arapahoe, and the justices of the peace and constables holding office within the city of Denver, shall become, respectively, said officers of the city and county of Denver, and the district attorney shall also be ex officio attorney of the city and county of Denver. The foregoing officers shall hold the said offices as above specified only until their successors are duly elected and qualified as herein provided for; except that the then district judges, county judge and district attorney shall serve their full terms, respectively, for which elected. The police and firemen of the city of Denver, except the chief of police as such, shall continue severally as the police and firemen of the city and county of Denver until they are severally discharged under such civil service regulations as shall be provided by the charter; and every charter shall provide that the department of fire and police and the department of public utilities and works shall be under such civil service regulations as in said charter shall be provided.

FIRST CHARTER.

Sec. 4. The charter and ordinances of the city of Denver as the same shall exist when this amendment takes effect, shall, for the time being only, and as far as

applicable, be the charter and ordinances of the city and county of Denver; but the people of the city and county of Denver are hereby vested with and they shall always have the exclusive power in the making, altering, revising or amending their charter, and, within ten days after the proclamation of the Governor announcing the adoption of this amendment the council of the city and county of Denver shall, by ordinance, call a special election, to be conducted as provided by law, of the qualified electors in said city and county of Denver, for the election of twenty-one taxpayers who shall have been qualified electors within the limits thereof for at least five years, who shall constitute a charter convention to frame a charter for said city and county in harmony with this amendment. Immediately upon completion, the charter so framed, with a prefatory synopsis, shall be signed by the officers and members of the conveitnon and delivered to the clerk of said city and county who shall publish the same in full, with his official certification, in the official newspaper of said city and county, three times, and a week apart, the first publication being with the call for a special election, at which the qualified electors of said city and county shall by vote express their approval or rejection of the said charter. If the said charter shall be approved by a majority of those voting thereon, then two copies thereof (together with the vote for and against) duly certified by the said clerk, shall, within ten days after such vote is taken, be filed with the secretary of state, and shall thereupon become and be the charter of the city and county of Denver. But if the said charter be rejected, then, within thirty days thereafter, twenty-one members of a new charter convention shall be elected at a special election to be called as above in said city and county,

and they shall proceed as above to frame a charter, which shall in like manner and to the like end be published and submitted to a vote of said voters for their approval or rejection. If again rejected, the procedure herein designated shall be repeated (each special election for members of a new charter convention being within thirty days after each rejection) until a charter is finally approved by a majority of those voting thereon, and certified (together with the vote for and against) to the secretary of state as aforesaid, whereupon it shall become the charter of the said city and county of Denver and shall become the organic law thereof, and supersede any existing charters and amendments thereof. The members of each of said charter conventions shall be elected at large; and they shall complete their labors within sixty days after their respective election.

Every ordinance for a special election of charter convention members shall fix the time and place where the convention shall be held, and shall specify the compensation, if any, to be paid the officers and members thereof, allowing no compensation in case of non-attendance or tardy attendance, and shall fix the time when the vote shall be taken on the proposed charter, to be not less than thirty days nor more than sixty days after its delivery to the clerk. The charter shall make proper provision for continuing, amending or repealing the ordinances of the city and county of Denver.

All expenses of charter conventions shall be paid out of the treasury upon the order of the president and secretary thereof. The expenses of elections for charter conventions and of charter votes shall be paid out of the treasury upon the order of the council.

No franchise relating to any street, alley or public place of the said city and county shall be granted except upon the vote of the qualified taxpaying electors, and the question of its being granted shall be submitted to such vote upon deposit with the treasurer of the expense (to be determined by said treasurer) of such submission by the applicant for said franchise. The council shall have power to fix the rate of taxation on property each year for city and county purposes.

NEW CHARTERS, AMENDMENTS OF MEASURES.

Sec. 5. The citizens of the city and county of Denver shall have the exclusive power to amend their charter or to adopt a new charter, or to adopt any measure as herein provided;

It shall be competent for qualified electors in number not less than five per cent. of the next preceding gubernatorial vote in said city and county to petition the council for any measure, or charter amendment, or for a charter convention. The council shall submit the same to a vote of the qualified electors at the next general election not held within thirty days after such petition is filed; whenever such petition is signed by qualified electors in number not less than ten per cent. of the next preceding gubernatorial vote in said city and county, with a request for a special election, the council shall submit it at a special election to be held not less than thirty nor more than sixty days from the date of filing the petition; Provided, That any question so submitted at a special election shall not again be submitted at a special election within two years thereafter. In submitting any such charter, charter amendment or measure, any alternative article or proposition may be presented for the choice of

the voters, and may be voted on separately without prejudice to others. Whenever the question of a charter convention is carried by a majority of those voting thereon, a charter convention shall be called through a special election ordinance as provided in section four (4) hereof, and the same shall be constituted and held and the proposed charter submitted to a vote of the qualified electors, approved or rejected, and all expenses paid, as in said section provided.

The clerk of the city and county shall publish, with his official certification, for three times, a week apart, in the official newspaper, the first publication to be with his call for the election, general or special, the full text of any charter, charter amendment, measure, or proposal for a charter convention, or alternative article or proposition, which is to be submitted to the voters. Within ten days following the vote the said clerk shall publish once in said newspaper the full text of any charter, charter amendment, measure, or proposal for a charter convention, or alternative article or proposition, which shall have been approved by a majority of those voting thereon, and he shall file with the secretary of state two copies thereof (with the vote for and against) officially certified by him, and the same shall go into effect from the date of such filing. He shall also certify to the secretary of state, with the vote for and against, two copies of every defeated alternative article or proposition, charter, charter amendment, measure or proposal for a charter convention. Each charter shall also provide for a reference, upon proper petition therefor, of measures passed by the council to a vote of the qualified electors, and for the initiative by the

qualified electors of such ordinances as they may by petition request.

The signatures to petitions in this amendment mentioned need not all be on one paper. Nothing herein or elsewhere shall prevent the council, if it sees fit, from adopting automatic vote registers for use at elections and references.

No charter, charter amendment or measure adopted or defeated under the provisions of this amendment shall be amended, repealed or revived, except by petition and electoral vote. And no such charter, charter amendment or measure shall diminish the tax rate for state purposes fixed by act of the General Assembly, or interfere in any wise with the collection of state taxes.

CITIES OF THE FIRST AND SECOND CLASS

Sec. 6. Cities of the first and second class in this state, are hereby empowered to propose for submission to a vote of the qualified electors, proposals for charter conventions and to hold the same, and to amend any such charter, with the same force and in the same manner and have the same power, as near as may be, as set out in sections four (4) and five (5) hereof, with full power as to real and personal property and public utilities, works or ways, as set out in section one (1) of this amendment.

SCHOOL DISTRICTS CONSOLIDATED

Sec. 7. The city and county of Denver shall alone always constitute one school district, to be known as District No. 1, but its conduct, affairs and business shall be in the hands of a board of education consisting of such

numbers, elected in such manner as the general school laws of the state shall provide, and until the first election under said laws of a full board of education which shall be had at the first election held after the adoption of this amendment, all the directors of school district No. 1, and the respective presidents of the school boards of school districts Nos. 2, 7, 17 and 21, at the time this amendment takes effect, shall act as such board of education, and all districts or special charters now existing are hereby abolished.

The said board of education shall perform all the acts and duties required to be performed for said district by the general laws of the state. Except as inconsistent with this amendment, the general school laws of the state shall, unless the context evinces a contrary intent, be held to extend and apply to the said "District No. 1."

Upon the annexation of any contiguous municipality which shall include a school district or districts or any part of a district, said school district or districts or part shall be merged in said "District No. 1," which shall then own all the property thereof, real and personal, located within the boundaries of such annexed municipality, and shall assume and pay all the bonds, obligations and indebtedness of each of the said included school districts, and a proper proportion of those of partially included districts;

Provided, however, That the indebtedness, both principal and interest, which any school district may be under at the time when it becomes a part, by this amendment or by annexation, of said "District No. 1," shall be

paid by said school district so owing the same by a special tax to be fixed and certified by the board of education to the council which shall levy the same upon the property within the boundaries of such district, respectively, as the same existed at the time such district becomes a part of said "District No. 1," and in case of partially included districts such tax shall be equitably apportioned upon the several parts thereof.

Sec. 8. Anything in the Constitution of this state in conflict or inconsistent with the provisions of this amendment is hereby declared to be inapplicable to the matters and things by this amendment covered and provided for.

APPENDIX C

COLORADO CONSTITUTION ARTICLE V, SECTION 1

LEGISLATIVE DEPARTMENT

Section 1. General assembly—initiative and referendum. (1) The legislative power of the state shall be vested in the general assembly consisting of a senate and house of representatives, both to be elected by the people, but the people reserve to themselves the power to propose laws and amendments to the constitution and to enact or reject the same at the polls independent of the general assembly and also reserve power at their own option to approve or reject at the polls any act or item, section, or part of any act of the general assembly.

(2) The first power hereby reserved by the people is the initiative, and signatures by registered electors in an amount equal to at least five percent of the total number of votes cast for all candidates for the office of secretary of state at the previous general election shall be required to propose any measure by petition, and every such petition shall include the full text of the measure so proposed. Initiative petitions for state legislation and amendments to the constitution, in such form as may be prescribed pursuant to law, shall be addressed to and filed with the secretary of state at least three months before the general election at which they are to be voted upon.

(3) The second power hereby reserved is the referendum, and it may be ordered, except as to laws necessary for the immediate preservation of the public peace, health, or safety, and appropriations for the support and maintenance of the departments of state and state institutions, against any act or item, section, or part of any act of the general assembly, either by a petition signed by registered electors in an amount equal to at least five percent of the total number of votes cast for all candidates for the office of the secretary of state at the previous general election or by the general assembly. Referendum petitions, in such form as may be prescribed pursuant to law, shall be addressed to and filed with the secretary of state not more than ninety days after the final adjournment of the session of the general assembly that passed the bill on which the referendum is demanded. The filing of a referendum petition against any item, section, or part of any act shall not delay the remainder of the act from becoming operative.

(4) The veto power of the governor shall not extend to measures initiated by or referred to the people. All elections on measures initiated by or referred to the people of the state shall be held at the biennial regular general election, and all such measures shall become the law or a part of the constitution, when approved by a majority of the votes cast thereon, and not otherwise, and shall take effect from and after the date of the official declaration of the vote thereon by proclamation of the governor, but not later than thirty days after the vote has been canvassed. This section shall not be construed to deprive the general assembly of the power to enact any measure.

(5) The original draft of the text of proposed initiated constitutional amendments and initiated laws shall be submitted to the legislative research and drafting offices of the general assembly for review and comment. No later than two weeks after submission of the original draft, unless withdrawn by the proponents, the legislative research and drafting offices of the general assembly shall render their comments to the proponents of the proposed measure at a meeting open to the public, which shall be held only after full and timely notice to the public. Such meeting shall be held prior to the fixing of a ballot title. Neither the general assembly nor its committees or agencies shall have any power to require the amendment, modification, or other alteration of the text of any such proposed measure or to establish deadlines for the submission of the original draft of the text of any proposed measure.

(6) The petition shall consist of sheets having such general form printed or written at the top thereof as shall

be designated or prescribed by the secretary of state; such petition shall be signed by registered electors in their own proper persons only, to which shall be attached the residence address of such person and the date of signing the same. To each of such petitions, which may consist of one or more sheets, shall be attached an affidavit of some registered elector that each signature thereon is the signature of the person whose name it purports to be and that, to the best of the knowledge and belief of the affiant, each of the persons signing said petition was, at the time of signing, a registered elector. Such petition so verified shall be prima facie evidence that the signatures thereon are genuine and true and that the persons signing the same are registered electors.

(7) The secretary of state shall submit all measures initiated by or referred to the people for adoption or rejection at the polls, in compliance with this section. The text of all measures to be submitted shall be published as constitutional amendments are published; and, in submitting the same and in all matters pertaining to the form of all petitions, the secretary of state and all other officers shall be guided by the general laws.

(8) The style of all laws adopted by the people through the initiative shall be, "Be it Enacted by the People of the State of Colorado".

(9) The initiative and referendum powers reserved to the people by this section are hereby further reserved to the registered electors of every city, town, and municipality as to all local, special, and municipal legislation of every character in or for their respective municipalities. The manner of exercising said powers shall be prescribed

by general laws; except that cities, towns, and municipalities may provide for the manner of exercising the initiative and referendum powers as to their municipal legislation. Not more than ten percent of the registered electors may be required to order the referendum nor more than fifteen percent to propose any measure by the initiative in any city, town, or municipality.

(10) This section of the constitution shall be in all respects self-executing; except that the form of the initiative or referendum petition may be prescribed pursuant to law.

APPENDIX D

AMMENDED GENERAL LAWS OF COLORADO, 1877

2655. Sec. 14. The city council and board of trustees in towns shall have the following powers:—

[First through Sixth powers omitted.]

Seventh—First, to lay out, establish, open, alter, widen, extend, grade, pave or otherwise improve streets, alleys, avenues, sidewalks, parks and public grounds, and vacate the same, and to direct and regulate the planting of ornamental and shade trees in such streets, avenues and public grounds; second, to plant trees upon the same; third, to regulate the use of the same; fourth, to prevent and remove encroachments or obstructions upon the same; fifth, to provide for the lighting of the same; sixth, to provide for the cleansing of the same; seventh, to regulate the openings therein for the laying out of gas or water mains and pipes, and the building and repairing of sewers, tunnels and drains, and erecting gas lights; *provided, however,* that any

company heretofore organized under the general laws of this state, or any association of persons organized, or which may be hereafter organized, for the purpose of manufacturing illuminating gas to supply cities or towns or the inhabitants thereof with the same, shall have the *right by consent* of the city council or town trustees, but not without such consent, (subject to existing rights,) to erect gas factories and lay down pipes in the streets or alleys of any city or town in this state, subject to such regulations as any such city or town may, by ordinance, impose; eighth, to regulate the use of sidewalks along the streets and alleys, and all structures thereunder, and to require the owner or occupant of any premises to keep the sidewalks, or along the same, free from snow and other obstructions; ninth, to regulate and prevent the throwing or depositing of ashes, garbage or any offensive matter in, and to prevent injury to, any street, avenue, alley or public ground; tenth, to provide for and regulate crosswalks, curbs and gutters; eleventh, to regulate and prevent the use of streets, sidewalks and public grounds for signs, sign posts, awnings, awning posts, telegraph poles, horse troughs, posting handbills and advertisements; twelfth, to regulate and prohibit the exhibition or carrying of banners, placards, advertisements or hand-bills in the streets or public grounds, or upon the sidewalks; thirteenth, to regulate and prevent the flying of flags, banners or signs across the streets or from houses; fourteenth, to regulate traffic and sales upon the streets, sidewalks and public places; fifteenth, to regulate the speed or horses and other animals, vehicles, cars and locomotives within the limits of the corporation; sixteenth, to regulate the numbering of houses and lots; seventeenth, to name and change the name of any street, avenue, alley or other

public place; eighteenth, to license, regulate and control the laying of railroad tracks to provide for and change the location, grade and crossing of any railroad, and to control, regulate and prohibit the use of steam engines and locomotives propelled by steam power within the corporate limits; nineteenth, to require railroad companies to fence their respective railroads, or any portion of the same, and to construct cattle guards at crossings of streets and public roads, and keep the same in repair within the limits of the corporation; twentieth, to require railroad companies to keep flagmen at railroad crossings of streets, and provide protection against injury to persons and property in the use of such railroads; twenty-first, to compel such railroads to raise or lower their railroad tracks to conform to any grade which may, at any time, be established by such city or town, and when such tracks run lengthwise of any street, alley or highway, to keep their tracks on a level with the street surface, and so that such tracks may be crossed at any place on such street, alley, or highway.

APPENDIX E

C. R. S. 1973, § 31-12-101 (20)

31-12-101. *Powers of governing bodies.* The governing bodies in cities and towns shall have the following powers:

[Subsections 1-19 omitted.]

(20) *Streets and public grounds.* (a) To lay out, establish, open, alter, widen, extend, grade, pave, or otherwise improve streets, alleys, avenues, sidewalks, parks, and public grounds and vacate the same and to direct and regu-

late the planting of ornamental and shade trees in such streets, avenues, and public grounds; to plant trees upon the same; to regulate the use of the same; to prevent and remove encroachments or obstructions upon the same; to provide for the lighting of the same; and to provide for the cleansing of the same;

(b) To regulate the openings therein for the laying-out of gas or water mains and pipes, and the building and repairing of sewers, tunnels, and drains, and the erecting of gaslights. Any company organized under the general laws of this state or any association of persons organized for the purpose of manufacturing illuminating gas to supply cities or towns or the inhabitants thereof with the same has the right by consent of the city council or town trustees, but not without such consent, subject to existing rights, to erect gas factories and lay down pipes in the streets or alleys of any city or town in the state, subject to such regulations as any such city or town by ordinance may impose;

(c) To regulate the use of sidewalks along the streets and alleys and all structures thereunder and to require the owner or occupant of any premises to keep the sidewalks, or along the same, free from snow and other obstructions;

(d) To regulate and prevent the throwing or depositing of ashes, garbage, or any offensive matter in, and to prevent any injury to, any street, avenue, alley, or public ground;

(e) To provide for and regulate crosswalks, curbs, and gutters;

(f) To regulate and prevent the use of streets, sidewalks, and public grounds for signs, signposts, awnings,

awning posts, telegraph poles, and horse troughs and for posting handbills and advertisements; to regulate and prohibit the exhibition or carrying of banners, placards, advertisements, or handbills in the streets or public grounds or upon the sidewalks; and to regulate and prevent the flying of flags, banners, or signs across the streets or from houses;

(g) To regulate traffic and sales upon the streets, sidewalks, and public places and to regulate the speed of horses and other animals, vehicles, cars, and locomotives within the limits of the corporation;

(h) To regulate the numbering of houses and lots and to name and change the name of any street, avenue, alley, or other public place.

[Subsections 21-81 omitted.]

APPENDIX F

COLORADO CONSTITUTION
ARTICLE XXV

Public Utilities

In addition to the powers now vested in the General Assembly of the State of Colorado, all power to regulate the facilities, service and rates and charges therefor, including facilities and service and rates and charges therefor within home rule cities and home rule towns, of every corporation, individual, or association of individuals, wheresoever situate or operating within the State of Colorado, whether within or without a home rule city or home

rule town, as a public utility, as presently or as may hereafter be defined as a public utility by the laws of the State of Colorado, is hereby vested in such agency of the State of Colorado as the General Assembly shall by law designate.

Until such time as the General Assembly may otherwise designate, said authority shall be vested in the Public Utilities Commission of the State of Colorado; provided however, nothing herein shall affect the power of municipalities to exercise reasonable police and licensing powers, nor their power to grant franchises; and provided, further, that nothing herein shall be construed to apply to municipally owned utilities.

APPENDIX G

C. R. S. 1973, § 43-2-124 and § 43-2-135

43-2-124. *City streets defined - maintenance.* (1) The city street system shall consist of all streets open and used, which shall include the primary system of major streets to be designated arterial streets, and a secondary system to be designated local service streets.

(2) Arterial streets are those streets carrying general traffic within the city and providing communication with surrounding territory and which are not part of the federal-aid and state highway connecting links within the city.

(3) Local service streets are all streets within a city open to public travel and which are not a part of the

federal-aid connecting links, state highways, or streets designated as arterial streets.

(4) The city streets system, both arterial and local service streets, shall be constructed and maintained by the respective city, city and county, or incorporated town.

43-2-135. *Division of authority over streets.* (1) The jurisdiction, control, and duty of the state, cities and counties, and incorporated towns with respect to streets which are a part of the state highway system is as follows:

(a) The city, city and county, and incorporated town shall exercise full responsibility for and control over any such street beyond and including the curbs and, if no curb is installed, beyond the traveled way, its contiguous shoulders, and appurtenances; except that the regulation and control of driveways shall be subject to the provisions of section 43-2-147.

(b) The state department of highways has authority to prohibit the suspension of signs, banners, or decorations above the portion of such streets between the curbs or portion used for highway purposes up to a vertical height of twenty feet above the surface of the roadway.

(c) The city, city and county, or incorporated town at its own expense shall maintain all underground facilities in such streets and has the right to construct such underground facilities as may be necessary in such streets.

(d) The city, city and county, or incorporated town has the right to grant the privilege to open the surface of any such street, but all damages occasioned thereby shall promptly be repaired either by the city, city and county, or incorporated town itself or at its direction.

(e) The city, city and county, or incorporated town at its own expense shall provide street illumination and shall clean all such streets, including storm sewer inlets and catch basins.

(f) The state department of highways has the right to utilize all storm sewers on such highways without cost; and if new storm sewer facilities are necessary in construction of streets by the state department of highways, the cost of such facilities shall be borne by the state and municipality as may be mutually agreed upon between the state department of highways and the local governing body of the city, city and county, or incorporated town.

(g) Cities, cities and counties, and incorporated towns shall regulate and enforce all traffic and parking restrictions on streets which are state highways, but all regulations adopted after December 31, 1979, shall be approved in writing by the state department of highways before becoming effective on such streets; except that such regulations shall become effective on such streets sixty days after receipt for review by the state department of highways if not disapproved in writing by said department during that sixty-day period.

(h) The state department of highways shall erect, control, and maintain at state expense all route markers and directional signs, except street signs on those streets.

(i) The state department of highways shall install, operate, maintain, and control at state expense all traffic control signals, signs, and traffic control devices on state highways in cities, the city and county of Denver, and incorporated towns. No local authority shall erect or maintain any stop sign or traffic control signal at any location so as to require the traffic on any state highway

to stop before entering or crossing any intersecting highway unless approval in writing has first been obtained from the state department of highways. For the purpose of this paragraph (i), striping, lane-marking, and channelization are considered traffic control devices.

(j) Rights-of-way for such street shall be acquired by either the city, city and county, or incorporated town or by the state as is mutually agreed upon. Costs of acquiring such rights-of-way may be at the sole expense of the state or the city, city and county, or incorporated town, or both, as may be mutually agreed. Title to all rights-of-way so acquired shall vest in the city, city and county, or incorporated town, or the state, according to the agreement under which said rights-of-way were secured.

(k) The state department of highways is authorized to acquire rights-of-way by purchase, gift, or condemnation for any such streets, highways, and bridges. Any such condemnation proceeding shall be exercised in the manner provided by law for condemnation proceedings to acquire lands required for state highways. Nothing in this section shall be construed as abrogating the rights of home rule cities to acquire lands for state purposes in the manner set forth in the charter of said cities.

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No. 80-1350
IN THE

Supreme Court of the United States

October Term, 1980

COMMUNITY COMMUNICATIONS COMPANY, INC.,
Petitioner,

vs.

CITY OF BOULDER, COLORADO,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

BRIEF OF CITY OF LOS ANGELES AMICUS CURIAE IN SUPPORT OF RESPONDENT.

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Question Presented.

Where the state constitution grants autonomy over local matters to a home rule city, does the City Council's valid exercise of those powers to enact an Ordinance to halt cable T.V. construction within the City limits for 90 days, constitute an act of government which is beyond anti-trust attack?

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Respondent.

BRIEF OF CITY OF LOS ANGELES AMICUS CURIAE IN SUPPORT OF RESPONDENT.

The City of Los Angeles grants cable television franchises for various geographical areas of the City. These franchises are granted by ordinance on a non-exclusive basis after public bidding. The City, however, has not granted more than one franchise for an area. There are presently eight franchised companies operating in the City, all in different areas. The City is in the process of evaluating bids received on four other areas. The City does have a vital interest in being able to continue to exercise its legitimate governmental powers in granting cable television franchises on a competitive basis without being subject to the Sherman Act.

Summary of Argument.

The decision of the Court of Appeals correctly concluded that when a local entity is exercising governmental, as opposed to proprietary powers, it is not subject to the federal

anti-trust laws. In addition "home-rule" cities, when exercising such powers, do not need specific state authorization for the particular action.

ARGUMENT.

A City, When Acting on Governmental or Local Matters, Does Not Need Specific State Authorization to Not Be Subject to the Federal Anti-Trust Laws.

The Court of Appeals' decision should be affirmed. It recognized that when a City is exercising its governmental powers it should not be subject to the federal anti-trust laws. The majority opinion in *Lafayette v. Louisiana Power and Light Co.*, 435 U.S. 389, 403 (1978), made the point that when a governmental agency acts as a *provider of services*, they impact on those businesses with which they interrelate (emphasis added). A City, in granting a television cable franchise, is not acting as a provider of services, it is not casting itself in the role of a competitor of other businesses.

Even the fee that a City receives from a franchise company is fixed. Section 76.31 of 47 Code of Federal Regulations provides that franchise fees paid to the grantor of the franchise not exceed 3 percent of the franchisee's gross revenue per year. The fee can be increased up to 5 percent of such revenues if approved by the Federal Communications Commission upon a showing of reasonableness, namely, that the increase will not interfere with the effectuation of federal regulatory goals in the field of cable television and that it is appropriate in light of the planned local regulatory program.

Petitioner argues that *Lafayette* requires a State legislature to specifically authorize a "specific kind of action in a particular area" (P. Br. 35) for the local entity to be immune from federal anti-trust laws. But this would be contrary to the concept of "home rule" which is meant to allow for a certain amount of flexibility and autonomy.

The California State Constitution provides that:

> "A county or city may make and enforce within its limits all local, policy, sanitary, and other ordinances and regulations not in conflict with general laws". Article XI, Sec. 7.

The California Supreme Court has stated:

> "It is, of course, undisputed that a municipality, under Article XI, Section 11 (now 7), of the State Constitution, may, within its limits, exercise police powers equal in extent to those of the state". *McKay Jewelers, Inc. v. Bouron,* 19 Cal.2d 595, 600; 122 P.2d 543, 546 (1942).

It is certainly of concern to the City and its residents that there be control by the City of the work in public ways in the construction of a franchise system and assurance of any necessary removal of any such work, including required repair of streets, if the franchise terminates. Additionally, the city may want to assure, as does the City of Los Angeles, by the terms and conditions of the franchise, that the franchise provide adequate customer service, *e.g.*, handling of complaints.

Since a home-rule or charter city, such as Los Angeles, already has the power, equal in extent to the state pursuant to the State Constitution, to regulate matters of local concern, it would be incongruous to say that they had to get specific authorization from the State legislature to exercise those very same powers in order to be immune from federal anti-trust laws.

Though the City of Los Angeles, as a charter city, through its police powers, does have the power to franchise cable television, the State has legislated on the matter. Government Code, Section 53066, provides:

> "§ 53066. COMMUNITY ANTENNA TELEVISION SYSTEM; FRANCHISE OR LICENSE; RULES

AND REGULATIONS.

Any city or county or city and county in the State of California may, pursuant to such provisions as may be prescribed by its governing body, authorize by franchise or license the construction of a community antenna television system. In connection therewith, the governing body may prescribe such rules and regulations as it deems advisable to protect the individual subscribers to the services of such community antenna television system. The award of the franchise or license may be made on the basis of quality of service, rates to the subscriber, income to the city, county or city and county, experience and financial responsibility of the applicant plus any other consideration that will safeguard the local public interest, rather than a cash auction bid. Any cable television franchise or license awarded by a city or county or city and county pursuant to this section may authorize the grantee thereof to place wires, conduits and appurtenances for the community antenna television system along or across such public streets, highways, alleys, public properties, or public easements of said city or county or city and county. Public easements, as used in this section, shall include but shall not be limited to any easement created by dedication to the city or county or city and county for public utility purposes or any other purpose whatsoever."

This state statute, however, does not specify if franchises can be granted on an area basis, on a city-wide basis, whether they be exclusive or not. Adopting petitioner's argument then that even with a state pronouncement, such as this statute, on the franchising of cable television a California county or city would still be subject to federal anti-trust laws because the statute did not specifically authorize certain actions involved in granting franchises.

Conclusion.

It is respectfully submitted that the decision of the Court of Appeals be affirmed.

Respectfully submitted,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MOTION FOR LEAVE TO FILE, AND BRIEF OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS AS AMICUS CURIAE

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CITY OF BOULDER, COLORADO.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The National Institute of Municipal Law Officers (NIMLO) moves the Court for leave to file the attached brief as amicus curiae in support of the respondent, City of Boulder. The City has consented to the filing of the brief, but the petitioner has withheld consent. The letters granting and withholding consent, respectively, have been lodged with the Clerk.

NIMLO submits that its brief can assist the Court in evaluating the suitability of home rule (as granted to local governments by the people of a state in the case of a constitutional amendment, or by the state legislature in the case of statutory home rule) as the state authorization for municipal

activity which satisfies the test established by this Court's decisions for municipal antitrust immunity. NIMLO's interest in the issue is set out in the Interest of the Amicus Curiae section of the attached brief. That brief analyzes the nature and purpose of grants of home rule during the last hundred years and considers whether local government regulation, through the franchise power, of cable television is an area which the states generally, through home rule, have ceded to local governments without either the expectation or the possibility of continuing, detailed, and technical state-level supervision.

Because of the emerging popularity of cable television, and the flux in both its regulatory environment and its technology, this case is of nationwide importance, and, we submit, the attached amicus brief will assist the Court in evaluating the nationwide importance of the decision in this case.

Therefore, we urge the Court to grant NIMLO leave to file the attached brief as amicus curiae.

Respectfully submitted,

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BRIEF OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS AS AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE

The National Institute of Municipal Law Officers (NIMLO) is a national organization of cities operated by their attorneys. NIMLO, founded in 1935 and organized as a nonprofit association, consists of 1600 local governments, which participate in NIMLO's work through their chief legal officers, variously called city or county attorney, corporation counsel, city solicitor or law director, and the chief legal officer's assistants. The City of Boulder, Colorado, is a member of NIMLO.

NIMLO is a nonpartisan, nonpolitical, fact-gathering and reporting organization which provides information and research to its member governments on current legal problems of local concern, including regulation of cable television, and on home rule.

The local government attorneys who participate in the work of NIMLO are responsible for drafting cable television franchise ordinances and agreements. These attorneys advise their governments on the antitrust implications of municipal action in all areas, and defend the actions of their governments when challenged in court. These attorneys have lived under the uncertainty following this Court's decision in *City of Lafayette v. Louisiana Power and Light Co.*, 435 U.S. 389 (1978). These attorneys recognize that a test for governmental antitrust immunity which can be satisfied only by express words on immunity addressed to antitrust from a state administrative agency or the state legislature itself is both unworkable and in conflict with the letter and spirit of the widespread grant of home rule to local governments. The application of the test to cable television franchising illustrates the unworkability of the test quite clearly.

NIMLO, therefore, urges this Court to avoid both a frustration of the goals of local government home rule and the vitiation of the *Parker v. Brown*[1] test of antitrust immunity, just as the Court of Appeals below did. Because that Court properly analyzed both the nature of home rule and the practical impossibility of requiring express state action, other than through the grant of home rule, in a case such as this, NIMLO urges affirmance of the judgment of the Court of Appeals.

---

[1]317 U.S. 341 (1943).

STATEMENT OF THE CASE

Boulder, Colorado's cable television franchise regulations have much in common with those recommended to cities nationally. Boulder's franchise to the petitioner was non-exclusive, revocable,[2] and lasted for twenty years, Pet. 2, A-1, A-50–51. The Federal Communications Commission has proposed that franchises be for 15-year periods, 66 F.C.C.2d 380 (1977), proposing amendment to 31 C.F.R. §76.31(a)(2). The Urban Institute's Cable Television Information Center prefers non-exclusive, revocable franchises, CTIC, How to Plan an Ordinance: An Outline and Some Examples, 6, 47 (1977).

The impetus for the petitioner's antitrust challenge was Boulder's application of its franchise regulations in order to compare competitive proposals from the petitioner Community Communications Co., and Boulder Communications Co., Pet. 3; Brief for Petitioners, 6; Pet. A-40, A-43 (opinion of the District Court); Pet. A-2 (opinion of the Court of Appeals) or any other interested cable proprietor.[3]

Differing with the contrary view of the District Court, the Court of Appeals held that Boulder's enactment and enforcement of its franchise regulations were immune from antitrust challenge. The Court of Appeals reasoned that Boulder was not competing with the petitioner, but was enforcing an affirmative governmental policy, Pet. A 8–A-9. In that regard, Boulder was exercising its home rule

[2]As Boulder has pointed out, Brief in Opposition, at 2, this feature was required by the Colorado Constitution.

[3]Boulder was motivated by the perception that competition would be impossible as a practical matter if the petitioner were allowed to wire the entire city before the City Council could review the petitioner's and competing proposals. See Brief in Opposition, at 3 (citing trial exhibits).

power to act in matters of local concern, Pet. A-6, and the home rule grant of power was sufficient state action under the precedents of this Court. Therefore, the Court of Appeals concluded, Boulder's cable television ordinances were not subject to injunction on the assertion the ordinances violated the antitrust laws.

SUMMARY OF ARGUMENT

It is our submission that, whenever a state has ceded its power to a local government through a grant of home rule, that cession constitutes sufficient state action to satisfy the first requirement for local government immunity from the antitrust laws set out in the precedents of this Court. Here, the City considered the competitive impact of its regulatory action; and this satisfied the second requirement. So, if its action was "state action", the City is within the perimeter of the immunity.

1. The nature and history of local government home rule show that through it a state provides a cession of power, without the possibility or desire of retaining supervisory jurisdiction in any state agency. After the grant of home rule power, its exercise is entirely by the city.

2. Moreover, the current trend in the governance of the states, under home rule and otherwise, is to provide that the regulation of cable television is a matter for local government without state interference or supervision.

Therefore, the silence of the State of Colorado on Boulder's longstanding regulation of the cable television activities of the petitioner is perfectly congruent with the

longstanding total cession of state power to Boulder under the Colorado Constitution, and, in light of the nature of cable television and the experience in other states with regulation of it, was the only practical state action. Having the benefit of this state action, Boulder's knowing and reasonable exercise of its regulatory power is immune from antitrust attack.

ARGUMENT

The decision of the Court of Appeals below rests on two grounds: (1) that Boulder was acting within the grant of home rule power of Article XX of the Colorado Constitution when it regulated the cable television activities of the petitioner through the two ordinances challenged here; and (2) that this grant and exercise of the home rule power constituted sufficient state action and authorization of the City's regulation to make the City's action immune from antitrust challenge.

The first ground of decision is a question of state law, which cannot properly be before this Court. The second ground of decision is congruent with the actions of the states, both in creating and maintaining municipal home rule, and in apportioning between themselves and their municipalities regulatory power over cable television.

I

THE ESSENTIAL FEATURE OF HOME RULE, AN *A PRIORI* CESSION OF STATE POWER TO A MUNICIPALITY WITHOUT EITHER THE POSSIBILITY OR EXPECTATION OF FURTHER STATE SUPERVISION, CONSTITUTES STATE ACTION

The Court of Appeals correctly synthesized the test of *Parker v. Brown*, 317 U.S. 341 (1943), *City of Lafayette v. Louisiana Power and Light Co.*, 435 U.S. 389 (1978), and *California Retail Liquor Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), to constitute as a requirement for government antitrust immunity that an expression of state policy clearly comprehend the challenged government action, and that the policy be supervised by the state.

Although the Court of Appeals thought the *Lafayette* case distinguishable, Pet. A-8, it held also that Colorado's grant of home rule satisfied the first requirement of the test, and that the City Council's actions pursuant to the home rule grant clearly satisfied the second part of the test. *Ibid.*

The petitioners essentially concede that, if the City's action is state action within the meaning of *Parker-Lafayette-Midcal*, then the elements of a knowingly articulated and actively supervised government policy were satisfied. Pet. 8. Otherwise stated, the petitioners would not challenge the actions of the City Council if they had been done by a state agency. The petitioner's sole ground for reversal here is that the rule applicable to a state government is not applicable to a home rule local government.

Therefore, the only issue in this case is whether home rule transmutes Boulder's action into state action.

A. State Silence is an Expected Feature of Home Rule, and the Silence is Construed as Authorization of Municipal Action

Home rule, first authorized in 1875 in Missouri, developed as a means to adapt to local needs the fast-

increasing activities of government.[4] The method of home rule was to substitute local government legislation, regulation and activity for state legislation, regulation and activity, within the proper sphere of local concerns. Home rule was granted either by constitution or by statute; the essence of either form was the selection by the local voters of a form of government and the apportionment of powers within the government.

Home rule is designed to free the state legislature from numerous local requests for special legislation, and, correspondingly, to permit municipal action "without waiting for state legislative authorization." Vanlandingham, Municipal Home Rule in the United States, 10 William and Mary L.Rev. 269, 270 (1968). While, after home rule has been established for a particular municipality, state supervision is sharply reduced, the initial adoption of home rule by the municipality is attended by complex state law requirements, both substantive (limited local taxing authority, e.g.) and procedural (charter advisory committees, e.g.). Home rule is far from an expression of lack of state interest. Rather, it is an *a priori* delegation of state power, with the understanding that, however the municipal officials handle their delegated power, they will be held accountable by the local voters.

Controversy soon arose over the rules to resolve a conflict between a home rule ordinance and a state statute. A continuing source of controversy has been the delineation of the border between matters of local and of statewide concern, even in the absence of state legislation. None of these issues is involved in this case.

[4]The general legal theory of home rule is described in 2 E. McQuillin, Municipal Corporations §4.28 (3d ed. rev. 1979), and in Thomas, *City of Lafayette*'s State Action Test Reformulated: A Meaningful Standard of Antitrust Immunity for Cities, 1980 Ariz. St. L.J. 345, 371-72.

This case involves the application of home rule to a local matter in the face of the state's silence after the initial grant of home rule power. The nature and purpose of home rule show that such silence was expected to occur often, and that the silence was to be taken as an affirmative state authorization of local government action. Dean Fordham[5] has summarized the affirmative nature of home rule:

> "The objective reaches beyond protection from particular legislative intervention; it goes toward assuring large cities and other units freedom of action in confronting a myriad of problems in contemporary life, as contrasted with traditional dependence upon the legislature for enabling legislation as to authority, structure and procedure."

J. Fordham, Local Government Law 70-71 (rev. ed. 1975).[6]

So, by the 1950's, legislative silence was seen as state acquiesence in the actions of home rule municipalities. The National League of Cities' (then, the American Municipal Association) Model Constitutional Provisions for Municipal Home Rule, §6 (1953), provided:

> "HOME RULE CHARTER POWERS
> "A municipal corporation which adopts a home rule charter may exercise any power or perform any function which the legislature has power to devolve upon a non-home rule charter municipal corporation and which is not denied to that municipal corporation by its home rule charter, is not denied to all home rule charter municipal corporations by statute and is within such limitations as may be established by statute."[7]

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[5]Jefferson Fordham is the prime mover of the modification, embodied in the National League of Cities' provision, discussed *infra*, of home rule to give maximum authority to state legislatures in home rule states. See Vanlandingham, *supra*, 10 William and Mary L. Rev., at 299.

[6]See also *id.*, at 73 (collecting statutes of the several states).

[7]See also, National Municipal League, Model State Constitutions, §8.02 (1963); Advisory Commission on Intergovernmental Relations, State Legislative Program, 185-86 (1963).

The Comment to this section of the League's model provisions makes clear that in some cases the state is expected to legislate to limit the exercise of municipal powers, but that, where the legislature is silent, the silence is to be taken as state authorization for local government action:

> "2. There is no question but that the draft does not go so far in its grant of home rule power as many advocates of home rule would like. It does not place any substantive powers and functions beyond legislative control by general law. The theory of the draft is not to create an imperium in imperio with municipal freedom from legislative control, but to leave a charter municipality free to exercise any appropriate power or function except as expressly limited by charter or general statute. This emphatically reverses the old strict-constructionist presumption against the existence of municipal power and, so long as the legislature does not expressly deny a particular power, renders unnecessary petitioning the legislature for enabling legislation."[8]

---

[8]The "imperium in imperio," rejected by the Comment, is associated with Colorado's form of home rule, among others. Vanlandingham, *supra*, 10 William and Mary L. Rev., at 286-87, 291.

Therefore, the view that legislative silence constitutes state action is applicable in states with more restrictive home rule grants than that of Colorado involved in this case.

So, the nationwide view of home rule counsels affirmance of the judgment of the Court of Appeals. That this case arose in Colorado merely makes it an *a fortiori* case.

Finally, it should be noted that legislative silence has been proposed as a workable method of resolving the preeminent and perennial problem of home rule administration—which is not involved in this case—namely, the resolution of conflict between state and local law. Vanlandingham, *supra*, 10 William and Mary L. Rev., at 305, proposes that "municipalities could be empowered to act in areas or on subjects where the state legislature has acted, subject to a legislative veto . . . of the next legislative session."

In sum, legislative silence after the grant of home rule power to a particular municipality is essential to the theoretical and practical nature of home rule. But, home rule is not an irresponsible abandonment of state power; it has not been an early state-level form of deregulation. Rather, and especially under the Fordham-National League of Cities model in vogue now, home rule represents, at the granting stage, a detailed balance between state and municipal action. Within the sphere of local concerns, however, the state legislature then intends to be silent; and it intends the silence to authorize municipal action.

That, of course, does not end the inquiry. Home rule status does not insulate every municipal act from antitrust review. It merely equates city action with "state action." More remains:

> "The municipal action, as state action, would be analyzed to determine if it reflected a legitimate regulatory interest. A city, like the state, would not be immune from liability for anticompetitive conduct designed to protect its own commercial interests. A city could not establish "state policy" by ordinance to immunize its own commercial activities from antitrust liability. Thus, commercial/entrepreneurial activities of a city would be protected by the state action exemption only when those activities were "compelled," "commanded," "directed," or "authorized" by state legislation. Nor could a city ordinance "immunize" private persons from the federal antitrust laws. Municipal acts would be exempt from antitrust liability only where the city had a legitimate regulatory interest and had made an affirmative determination pursuant to delegated state authority that that interest was of sufficient magnitude to displace the federal interest in preserving competition."

Thomas, *City of Lafayette*'s State Action Test Reformulated: A Meaningful Standard of Antitrust Immunity for Cities, 1980 Ariz. St. L.J. 345, 379-80.[9]

In this case, however, the petitioner cable company essentially concedes the correctness of the conclusion of the Court of Appeals that Boulder's activity was regulatory, not commercial, and that Boulder appreciated fully the competitive impact of its actions. Petitioner's whole case[10] is that Boulder's action, however reasonable, was not "state action." And that case must fail.

So here, Colorado granted Boulder home rule within a detailed constitutional scheme. From that point, Colorado's silence in matters of local Boulder concern was expected, and that silence has been realized. That state silence in the face of Boulder's active regulation of cable television constitutes the state's policy within the meaning of this Court's antitrust immunity precedents.

B. In Other Areas of Federal Law as Well, State Silence After a Cession of Power is Consistent with State Action

The holding that an *a priori* cession of state power constitutes state action is a common one in the other major area of federal law in which the existence of "state action" is a requirement for some liability or immunity. That area is civil rights.

[9]At the same time, home rule, an apportionment of regulatory power, is perfectly consistent with a vigorous policy of enforcing the antitrust laws against private anticompetitive transactions. That is the traditional role of state governments, and the *amici* states are to be congratulated on their interest in private-sector enforcement. Amici Curiae Brief for the States of Alaska, et al., at 1. That role, and that interest, however, has nothing to do with this case.

[10]This choice of threshold ground is hardly surprising in a case arising out of a preliminary injunction.

State action is required for liability to accrue under the Fourteenth Amendment. Since *Home Telephone and Telegraph Co. v. City of Los Angeles*, 227 U.S. 278, 289 (1913), this Court has employed a functional test: whether "the act be one which there would not be opportunity to perform but for the possession of some state authority." In that case, a city's designation of telephone rates was challenged as confiscatory, and the issue was whether the city's was "state action," 227 U.S., at 282-83. It was sufficient to the Court in holding that passage of a city rate ordinance was state action to point to "the authority of a municipal ordinance passed in virtue of power conferred by a state. . . ." 227 U.S., at 294.[11]

The California grant to Los Angeles in *Home Telephone* of the power to regulate telephone rates was as general, *a priori*, and unsupervised[12] as Colorado's power to Boulder to regulate cable television rates and operations.[13]

Home Telephone is instructive in another regard as well. There, telephone rate regulation was an area of traditional state involvement. Yet, state supervision of, or consent to, Los Angeles' ratemaking was not necessary to the finding of "state action" in the City's action.

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[11]The Court in *Home Telephone* found cases imputing to a city the state action required under the Contracts Clause, Art. I, § 10, of the Constitution, to be persuasive. 227 U.S., at 295-96.

See also *Screws v. United States*, 325 U.S. 91, 116 (1945) (Rutledge, J., concurring).

[12]See also *Lovell v. Griffin*, 303 U.S. 444, 450 (1938) (city leaflet ordinance); *Turner v. City of Memphis*, 369 U.S. 350, 353 (1962) (city airport lease to restaurant); *Hunter v. Erickson*, 393 U.S. 385, 389 (1969) (city charter amendment requiring referendum approval of fair housing ordinance); *Edelman v. Jordan*, 415 U.S. 651, 667, n.12 (1974).

[13]The cases in this area concern only city action as "state action." The question whether individual action is "state action" is not involved. (cf., Brief for Petitioner, at 19, n.9.)

Cable television regulation presents the *a fortiori* case: here, there is no tradition of state involvement,[14] and the current wisdom counsels against state interference in municipal cable television regulation.

II

EVEN APART FROM HOME RULE, STATES RECOGNIZE MUNICIPAL REGULATION OF CABLE TELEVISION AS AN AREA IN WHICH DETAILED STATE SUPERVISION IS INAPPROPRIATE

The particular exercise of the general home rule power at issue in this case, regulation of cable television, is parallelled by a general local government power to regulate the use of its streets through the franchise.[15] Even in cities without home rule powers, control of the streets is one of the areas in which express and particularized state grants of municipal power are most common.[16]

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[14]See section II of this Brief, *infra.*

[15]The State of Colorado has reprinted Boulder's ordinances relying on this power. See, Amicus Curiae Brief for the State of Colorado in Support of the Petitioner (on certiorari), at 17, & App. G, H, I, J.

[16]12 E. McQuillin, Municipal Corporations §34.01 (3d ed. rev. 1970). That text continues:

> "Formerly, the right to grant franchises to use the streets was to a large extent withheld from municipalities and vested in the legislature which could grant the use of streets without the consent of the municipality or its citizens and inhabitants, and even without compensation; but the tendency of modern legislation is to delegate to the local authorities the exclusive dominion over the streets of the respective municipalities, and the value of local self-government in this respect is self-evident."

Id., §34.01, at 7 (citing cases).

Moreover, regulation through the franchise power is now seen as regulation for the public welfare rather than a privilege or a contractual relationship solely between a municipality and a cable television operator:

> "Franchises have been regarded as special privileges granted by the government to particular individuals or companies to be exploited for private profits. They are coming to be regarded, however, not so much as privileges, but rather as functions delegated to private individuals to be performed for the furtherance of the public welfare and subject to public control."[17]

Therefore, it can hardly be doubted "from the [home rule] authority given a governmental entity to operate in a particular area [in light of the long history of local autonomy in exclusive and nonexclusive revocable street franchises in the public interest] that the [Colorado] legislature contemplated the kind of action [by Boulder] complained of." *Lafayette, supra,* 435 U.S., at 394 (mutatis mutandis).

Even apart from considerations of home rule, the states which have reviewed the role of state government in the use of the municipal franchise power to regulate cable television have concluded that active state supervision of municipal regulation is inappropriate.

In 1979, Pennsylvania[18] studied the desirability of state agency regulation of local cable television franchising and concluded:

> "we would recommend that neither an independent state regulatory agency nor the PUC assert jurisdiction over cable television. . . . . the major impact point

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[17] *Ibid.* (citing cases).

[18] Precursors in other states from the previous decade are collected in Barnett, State, Federal and Local Regulation of Cable Television, 47 Notre Dame Lawyer 685, 756 (1972).

of cable operations is on the municipal level. Local governments can best determine, through negotiation with cable companies, the local public interest of CATV within their communities."[19]

The result of Pennsylvania's study is hardly surprising. The constant change in the technical features of a franchised cable television system which will best serve a city's residents is well known to local government officials.[20] The practical power of a particular local government to insist on a high degree of technical sophistication in cable television service depends on the attractiveness of the area as a cable market (including the availability of the entire city as a market), and on competition for the franchise.

The general attitude of the state cable television studies to preserve local flexibility and progress by preserving local autonomy, in recognition of the revocability of franchises, is precisely the kind of general grant of state authority which suffices as state authorization under *Lafayette.* E.g., *Cedar-Riverside Associates, Inc. v. United States,* 459 F.Supp. 1290, 1298 (D. Minn. 1978).

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[19]Pennsylvania Local Government Commission, Cable Television in the Commonwealth of Pennsylvania: Analysis and Recommendations, at 104-105 (November 1979). Rather, the Commission recommended legislation expanding local government authority, *id.*, at 102, and creating a state Bureau of Cable Communications to provide technical assistance, make studies and mediate disputes, *id.*, at 104.

[20]Rice, Cable: the Possibilities, Colorado Municipalities, November-December 1980, 15, lists: cablecasting public hearings and bus schedules (often broadcast to only the affected part of a wired community), community organization access requirements, joint franchising by several cities, the capacity of several community systems to share programming, and two-way features to allow polling subscribers.

In this case, Boulder tried to use the competition which its ordinances contemplated to the best advantage of its citizens' localized needs. That is precisely what the states expect their local governments to do.[21]

[21]Judge Markey in dissent, Pet. A-27, pointed out that Colorado's Public Utilities Commission had seen itself without jurisdiction over cable television. Judge Markey, like the District Court, was prompted by "wider concerns" than the application of this Court's antitrust immunity precedents. Pet. A-29.

CONCLUSION

Even apart from home rule, state supervision of municipal cable television regulation is considered unwise. There is no practical possibility of express state supervision of municipal action in this area.

That is precisely the void home rule was designed to fill. By articulating the rules of its noninterference in local concerns in advance, a state granting home rule initially has taken state action.

The state's subsequent silence in municipal affairs is the expected and preferred result under home rule. It is up to the home rule municipality to take all further governmental action.

Boulder did so here, assessing the anticompetitive potential of its regulation, as the Court of Appeals held, Pet. A-8, and as the petitioner concedes.

Therefore, the home rule grant to Boulder and Boulder's active regulation of cable television under that grant satisfy the requirements of state action.

Boulder's actions, therefore, were immune from antitrust attack, as the Court of Appeals correctly held under the precedents of this Court. The judgment should be affirmed.

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No. 80-1350

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

COMMUNITY COMMUNICATIONS COMPANY, INC., *Petitioner,*

v.

CITY OF BOULDER, COLORADO, *Respondent.*

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF NATIONAL LEAGUE OF CITIES AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENT

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QUESTION PRESENTED

Whether the delegation to a city of a State's complete authority to regulate and govern matters of local concern does not confer to the city, absent some contrary indication of State intent, the same immunity from antitrust attack that the State would possess if it exercised such authority rather than delegated it to the city?

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The National League of Cities moves the Court under Rule 36 for leave to file the attached brief *amicus curiae* in the above-entitled case, and in support thereof states:

1. The National League of Cities ("NLC") is an Illinois not-for-profit corporation organized in 1933 to assist municipalities in performing their functions. Its membership includes direct member cities, state municipal leagues and state league member cities. In all, almost 15,000 cities and municipalities, both large and small, are members of and participate in the activities of NLC. The functions of NLC as authorized in its Bylaws include "the safeguarding of the interests, rights and privileges of municipalities."

2. This case calls upon the Court to clarify the circumstances under which a city's governmental acts will be insulated from antitrust attack under the "state action doctrine." The Court's answer is of enormous consequence to cities as well as states and could threaten the sovereignty of states and their instrumen-

talities, generate serious impediments to the abilities of states and cities to govern effectively and otherwise undermine the efficacy of the federal system of government.

3. NLC wishes to participate in this case in order to provide the Court with a broader understanding of the workings of municipal governments and the consequences which its decision will have upon such entities. NLC believes that its views can assist the Court in further defining or reformulating a test for municipal antitrust immunity which will be meaningful and workable within the practical context of local and state government operations.

4. NLC seeks to have the Court appreciate the correspondence between the governmental acts of the City of Boulder that are at issue in this case and the basic and traditional authorities and activities of all municipal governments. If such activities as zoning, licensing and franchising are now ruled to be subject to antitrust scrutiny, NLC believes that the capacity of municipal governments to perform their traditional roles in the federal system will be seriously impaired.

5. NLC also believes it important for the Court to appreciate the significance of the breadth of the home rule authority which is at issue here and the continuing dispute between state and local government administrators throughout the Country with respect to this charter of local self-government. The shortsighted and exaggerated fears expressed by the state *amici* should be assessed in this context. It is the position of the NLC that where, as in Colorado, the State Constitution provides for and expressly favors local self-government and broad home rule, such policies merit the deference of this Court and should not be rescinded by unwarranted and unmanageable restrictions upon their use at the behest of the state attorneys general. If the states and their people truly desire to place municipal governments under the strictures of the antitrust laws, they can do so by amendments to appropriate legislation or constitutional provisions.

6. Finally, NLC urges that any principles that the Court articulates that could subject municipal acts to federal antitrust scrutiny must be consistent with the Constitutional reach of the Commerce Clause and be sufficiently clear and comprehensible that municipalities would not unwittingly subject their citizens to

the tremendous and possibly bankrupting expense of treble damage awards which could flow automatically from inadvertent antitrust violations.

7. Accordingly, NLC seeks to explain its views to this Court and to assist in determining the issues presented by this case.

8. Consent has been sought from the parties to the filing of a brief *amicus curiae*. Consent was refused by counsel for Community Communications Company, Inc.

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BRIEF OF NATIONAL LEAGUE OF CITIES AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENT

INTEREST OF THE AMICUS CURIAE

The interests of the National League of Cities are set out in the foregoing Motion.

STATEMENT OF THE CASE

The City of Boulder is one of several home rule cities to which the Colorado Constitution "grants the full right of self-government in both local and municipal matters" such that local and municipal ordinances are deemed to supersede contrary state statutes.[1] This case involves an antitrust challenge of certain ordinances[2] which the City of Boulder enacted pursuant to its home rule authority in December, 1979 and which imposed a 90-day

[1] Colorado Constitution, art. XX, sec. 6.

[2] City Ordinances Nos. 4472 and 4473, reprinted in the Appendix to the Petition for Certiorari ("App. Pet.") at A-55 to A-65.

moratorium on new cable television construction by the petitioner within the city limits.[3]

The moratorium that petitioner challenges resulted from a five-month study initiated by the City in July, 1979 to explore the best means of achieving competition in the Boulder cable television market.[4] This study was prompted by petitioner's announcement of its intention to expand its cable television system in Boulder and by one of petitioner's competitors filing an application for a permit to build its own cable television system.[5] After numerous City Council meetings at which these events were reviewed,[6] the Council concluded that competition could not be achieved simply by issuing further permits to other cable television companies. Rather, the Council found that in light of petitioner's presence in the market and substantial headstart in "wiring" and developing its system, potential competitors would not enter the Boulder cable television market unless further construction was halted.[7] Based upon this conclusion and the Council's belief that Boulder's cable television market resembled a "natural monopoly,"[8] the City decided to maximize competition by halting the expansion of petitioner's system and soliciting proposals from other cable television operators to compete with peti-

[3] Petitioner was then the only cable television company operating in Boulder, although its operating permit was non-exclusive and revocable by the City. City Ordinances No. 2846 (App. G to Colo. *amicus curiae* br. for cert.); Colorado Constitution, art. II, sec. 11.

[4] *See, e.g.,* Boulder Ex. X (transcript of July 31, 1979 City Council meeting) at 13-15, 19, 22-24, 37-38, 41-43; Boulder Ex. Y (transcript of November 29, 1979 City Council meeting) at 20-21, 26-30; Boulder Ex. Z (transcript of December 4, 1979 City Council meeting) at 5-6, 11, 16, 23-25.

[5] *Community Communications Co.* v. *City of Boulder,* 485 F. Supp. 1035, 1036 (D. Colo. 1980).

[6] *See, e.g.,* Boulder Ex.X (transcript of July 31, 1979 City Council meeting) at 13-15, 19, 22-24, 37-38, 41-43; Boulder Ex. Y (transcript of November 29, 1979 City Council meeting) at 20-21, 26-30; Boulder Ex. Z (transcript of December 4, 1979 City Council meeting) at 5-6, 11, 16, 23-25.

[7] *Id.*

[8] *See, e.g.,* Boulder Ex. X at 23.

tioner.[9] This decision, in effect, to franchise only the best of several potential cable television operators was a sound governmental regulation and was no different than thousands of other licensing and franchising decisions which cities have traditionally made and routinely make on a daily basis.[10] Moreover, it was in no way tainted by proprietary interests since Boulder was not itself in the business of providing cable television services, and the City's decision was not designed to, nor did it actually provide, Boulder with any greater revenues than the regulatory options urged by petitioner.[11]

Nevertheless, petitioner chose to challenge the City's ordinances under the federal antitrust laws and filed this case in Federal District court on January 15, 1980 seeking treble damages and injunctive relief against the City. On March 15, 1980, the District Court held that the City's conduct had imposed a "restraint of trade" and issued a preliminary injunction enjoining the City "from taking any unilateral action to restrict, limit or revoke the authority of [petitioner] to conduct its cable television business. . . ." [12] On May 28, 1980, the Court of Appeals for the Tenth Circuit reversed the District Court's issuance of the preliminary injunction, finding that the federal antitrust laws

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[9] Shortly after adopting the moratorium Ordinances, the City began its attempts to induce competitors to come into the Boulder cable T.V. market. On January 11, 1980 the City mailed draft applications for cable permits to over 50 cable operators in the United States. (Westdyke, March 4 Tr. 43). The City also placed advertisements in the *Wall Street Journal* (Varnes, March 6 Tr. 20). Only three cable operators (other than petitioner) responded to the City's solicitation. Each of the operators, including BCC, indicated, subsequent to filing its proposal, that it would not enter the market if petitioner proceeded to "wire" the entire City. (Boulder Ex. 1-2d at 1089-1102, 1110-11).

[10] *See, e.g.,* notes 19-21 *infra* and accompanying text.

[11] *See Community Communications Co.* v. *City of Boulder,* 630 F.2d 704 (10th Cir. 1980) (hereinafter cited as 630 F.2d at 704).

[12] *Community Communications Co.* v. *City of Boulder,* 485 F. Supp. 1035, 1036 and 1041 (D. Colo. 1980) (hereinafter cited as 485 F. Supp. at 1036 and 1041).

were not applicable to the City's conduct under the "state action" doctrine enunciated in *Parker* v. *Brown*, 317 U.S. 341 (1943) and its progeny.[13] The correctness of the Tenth Circuit's determination is now the subject of this Court's review.

SUMMARY OF THE ARGUMENT

Considerations of federalism require that the federal antitrust laws not apply to state action or official action directed by a state. As this Court recognized in *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389 (1978), a state mandate for the anticompetitive activities of cities exists when it is found from the authority given such entities to operate in a particular area that the legislature contemplated the kind of action complained of. Colorado's grant of complete self-government to its home rule municipalities with respect to local and municipal matters provides an adequate state mandate to shield its cable television moratorium from antitrust scrutiny.

Petitioner's blanket assertions that only the state can originate anticompetitive policy and that the state must actively supervise the consequences of such policy in order for state action immunity to exist is contravened by this Court's decision in *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977). *Bates* clearly demonstrates that the broad constitutional grant of authority by Colorado to Boulder makes that home rule city "the ultimate body wielding the State's power" over local and municipal matters and thus enables it to properly assert a state action defense in this case.

The suggestion that *City of Lafayette* makes municipal antitrust immunity dependent upon a specific state delegation of authority and active state supervision of each of the thousands of municipal activities that have competitive consequences will unreasonably impinge upon the sovereignty of states and their cities and threaten the proper allocation of governmental authority. It is simply unrealistic to assume that states have the resources, expertise or interest to immerse themselves in the variety of activities engaged in by their subdivisions. Moreover, such a rule would likely hamper a state's ability to concentrate its attention

[13] 630 F.2d at 704.

and resources on matters of statewide concern while, at the same time, encourage unsatisfactory uniform, centralized state planning and regulation rather than vital and long-valued local self-government. The rigid constraints which petitioners would impose on municipal government in the name of *City of Lafayette* would subvert the very full and meaningful sovereignty of state and local governments which this Court has found guaranteed by the principles of federalism.

In *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), principles of federalism as well as Tenth Amendment limitations were considered to militate against Congress' imposing on local governments national choices as to how essential decisions regarding the conduct of governmental activities are to be made. *Usery* suggests that competitive choices embodied in the federal antitrust laws cannot be imposed on cities or states to the extent they threaten the allocation of governmental power between state and local governments.

In sum, the Tenth Circuit's decision strikes the necessary balance between constitutional principles of federalism and the congressional desire to establish competition as the guiding principle governing commerce. State action immunity, as the Tenth Circuit recognized below, may flow from the local government's possession of authority from the state to act as sovereign and, when acting in that capacity, to express the clear and articulate rationale for its policy as well as to supervise this conduct. Because the Circuit Court's decision in this case faithfully adheres to these principles, it should be affirmed.

ARGUMENT

COLORADO'S DELEGATION TO THE CITY OF BOULDER OF COMPLETE AUTHORITY TO GOVERN AND REGULATE MATTERS OF LOCAL CONCERN CONFERRED ON BOULDER THE SAME IMMUNITY FROM ANTITRUST ATTACK THAT THE STATE WOULD HAVE POSSESSED IF IT HAD IMPOSED THE REGULATIONS IN QUESTION RATHER THAN DELEGATING THAT POWER TO BOULDER.

In reaching its decision in this case, the Tenth Circuit applied the standards enunciated by this Court in *California Retail Liquor*

Dealers Ass'n v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980)[1] to the City of Boulder's conduct and, finding that Boulder satisfied those standards, concluded that the Sherman Act was not applicable to Boulder by virtue of the "state action" doctrine. Petitioner does not argue that the Tenth Circuit misapplied the *Midcal* standards. In other words, there is no argument that if Colorado, rather than the City of Boulder, engaged in the challenged conduct, the Tenth Circuit's decision would be wrong. Rather, petitioner contends that *Midcal's* state action standards can never be satisfied by the policy or conduct of a municipality. This is because under petitioner's view a municipality or other political subdivision may never originate an anticompetitive policy, even when it has been granted complete authority to establish substantive law and policy on a State's behalf.[2] As demonstrated below, nothing in this Court's decision in *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389 (1978) or any other decision of this Court supports such an assertion which would so obviously hamper the effective allocation and exercise of state and local governmental powers.

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[1] 445 U.S. 97 (1980). The Court held that two standards needed to be satisfied for antitrust immunity under *Parker* v. *Brown*. "First, the challenged restraint must be one clearly articulated and affirmatively expressed as state policy; second, the policy must be actively supervised by the State itself." *Id.* at 105.

[2] Petitioner argues that its interpretation of *City of Lafayette*, which requires cities to obtain specific approval by the state legislature before adopting any anticompetitive policy, will not impair the autonomy of local governments because "only states can originate anticompetitive policy; and, they are not allowed to do so because their policies are better, but because only states have the type of sovereign status which triggers Federal deference in the *Parker* sense."Petitioner's Brief, p. 42 (footnote omitted).

I. THE TENTH CIRCUIT'S HOLDING THAT BOULDER'S ORDINANCE IMPOSING A TEMPORARY MORATORIUM ON CABLE TELEVISION CONSTRUCTION WAS NOT SUBJECT TO ANTITRUST ATTACK UNDER THE STATE ACTION DOCTRINE IS CONSISTENT WITH THE *CITY OF LAFAYETTE* DECISION AND OTHER APPLICABLE PRECEDENT.

A. The Purpose Of The Sherman Act Was To Prohibit Individual And Corporate Efforts To Restrain Trade And To Monopolize; It Did Not Undertake To Prohibit Restraints Imposed As A Result Of State Action.

Parker v. *Brown*, 317 U.S. 341 (1943),[3] the Supreme Court decision formulating the doctrine of state action, involved an antitrust challenge to a California statute that authorized the establishment of an agricultural program for the marketing of raisins produced in the state. The clear effect of the program was to restrict competition among raisin growers and to fix the price of raisins in the state. Assuming that the program would have violated the Sherman Act if established by private parties, the Court nevertheless held that Congress never intended the Sherman Act "to restrain state action or official action directed by a state." *Id.* at 351. Rather, "its purpose was to suppress combinations and attempts to monopolize by individuals and corporations. . . ." *Id.* Hence, the agricultural program did not violate the antitrust laws because "the state made no contract or agreement and entered into no conspiracy in restraint of trade or to establish a monopoly but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit." *Id.* at 352.

It is clear that *Parker* v. *Brown* was not intended to establish absolute immunity for all possible actions by states from the Court's remark that the case presented "no question of a state or its municipality becoming a participant in a private agreement or combination by others for restraint of trade." 317 U.S. at

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[3] The principles applied in *Parker* had been articulated in two earlier cases, *Olsen* v. *Smith*, 195 U.S. 332 (1904) and *Lowenstein* v. *Evans*, 69 F. Supp. 908 (D.S.C. 1895), which recognized both state authority to act in an anticompetitive manner and state authority to regulate economic activity in an anticompetitive manner.

351-52.[4] At the same time, the phrases "state action or official state action directed by a state" and "a state or municipality" suggest that the Court properly assumed that the same official state actions that must be immunized from antitrust attack may also be undertaken, as a matter of political reality, by local governments at the direction of their states. These local governmental acts require similar immunity if the purposes of federalism are to be served.[5]

B. In *City Of Lafayette*, The Court Held That Under The State Action Doctrine An Entity's Status As A Municipality Did Not Automatically Entitle It To The Same Protection As A State But That An Adequate State Mandate For The Anticompetitive Activities Of A Municipality Existed When Its Authority To Operate In Particular Areas Contemplated The Kind Of Anticompetitive Action Which Was Taken.

In *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, the Court considered whether the "state action" doctrine announced in *Parker* v. *Brown* applied to cities in the same manner that it does to states. Petitioners, two Louisiana cities, contended that a private utility's antitrust counterclaim against them should be dismissed because, as cities, they were state subdivisions exercising powers delegated by the State.[6] Accordingly,

[4] The Court thus indicated that certain categories of conduct would violate the antitrust laws whether they are engaged in by states or their subdivisions. *See* note 27 *infra*.

[5] Any deference to state sovereignty is illusory to the extent that it precludes a state from unequivocally electing to entrust to its subdivisions the power to make affirmative choices against competition in the course of administering law and furnishing services within their boundaries. Such a limitation on the kinds of purposes states may have in delegating to their subdivisions the authority to act in restraint of trade belies an acceptance of "a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority." 317 U.S. at 351.

[6] Petitioner's reliance upon their status as cities led both the Court and respondents to characterize this argument as an assertion that all state agencies or subdivisions of a State are automatically exempt from the antitrust laws by reason of their status as such.

they argued that *Parker's* findings regarding the scope of the Sherman Act applied to them with the same force as it did to the State. *See* 435 U.S. at 394. A plurality of the Court rejected this proposition but clearly recognized that "[m]unicipal corporations are instrumentalities of the State for the convenient administration of government within their limits" and, accordingly, "that actions of municipalities may reflect state policy." 435 U.S.at 413.[7] The plurality opinion contains slightly varying formulations as to when such municipal action would constitute state action and thus, fall within the *Parker* doctrine. Essentially, however, the plurality's thesis can be stated as follows:

> [T]he *Parker* doctrine exempts only anticompetitive conduct engaged in as an act of government by the State as sovereign, or, by its subdivisions, pursuant to state policy to displace competition with regulation or monopoly public service. . . . This does not mean, however, that a political subdivision necessarily must be able to point to a specific detailed legislative authorization before it properly may assert a *Parker* defense to an antitrust suit. . . . [A]n adequate state mandate for anticompetitive activities of cities and other subordinate governmental units exists when it is found "from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the

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See, e.g., 435 U.S. at 408. Such an assertion was an obvious overstatement, however, since not even states enjoy a "blanket exemption" from the antitrust laws. *See, e.g., Parker* v. *Brown*, 317 U.S. at 351. Unfortunately, however, the analysis of this issue deflected the Court's focus to some extent from the important issue whether *Parker* logically protects cities to the same extent as states. Petitioner's claim here that the Tenth Circuit's decision will bestow "blanket antitrust immunity" upon thousands of municipalities is even further exaggerated and similarly irrelevant to determining under what circumstances state government agencies and municipalities may stand in the shoes of the state for *Parker* v. *Brown* purposes.

[7] In a concurring opinion, the Chief Justice opined that the case was controlled by the fact that the challenged activity was a purely proprietary, business activity which Congress could not have intended to exempt from antitrust scrutiny. *See* 435 U.S. at 417-422.

kind of action complained of." 435 U.S. at 413-15.[8]

The primary issue before this Court is whether the Tenth Circuit was correct in deciding that the home rule authority granted to the City of Boulder in local and municipal matters meets the standards formulated in the *City of Lafayette* decision. The National League of Cities as *amicus curiae* submits that the decision of the Tenth Circuit is completely consistent with *City of Lafayette* and that Petitioner's interpretation of *City of Lafayette* creates unattainable standards which seriously jeopardize the effective allocation and exercise of state and local government power.

C. The Tenth Circuit's Decision Accords With The *City Of Lafayette* Decision And Other Supreme Court Precedent.

The Tenth Circuit's holding that Petitioner's antitrust claim was not redressable against the City of Boulder was based upon a determination that the City was exercising Colorado's ultimate sovereign authority when it engaged in the challenged conduct. Quoting the lower court, the Tenth Circuit stated:

> If you get down to the ultimate source of the power, and governmental concepts, Boulder is exercising authority of the people of the state of Colorado in matters of local concern within Boulder, because the people of the state of Colorado exercising their ultimate sovereign power put Article 20 in the Constitution of this state. They are not operating under some delegated authority from the representatives in the general assembly. They are operating on the basis of the ultimate sovereign authority of the people of the state. That's what Colorado's Article 20 is all about. 630 F.2d at 707.

The Tenth Circuit held initially that such a complete grant of authority was "an adequate state mandate" for the allegedly anticompetitive activities. Then, the court applied the standards enunciated in *Midcal* to the City's challenged regulation as if the State had itself imposed this regulation. The Tenth Circuit also

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[8] *See Cedar-Riverside Associates, Inc.* v. *United States*, 459 F. Supp. 1290, 1298 (D. Minn. 1978).

appropriately distinguished *City of Lafayette* from this case. The analysis employed by the Tenth Circuit is unquestionably correct.

1. Colorado's grant of total self-government to its home rule cities with respect to local and municipal matters provides an adequate state mandate for any local and municipal activities that may be anticompetitive.

In this case, Colorado, through its constitutional home rule provisions, granted the City of Boulder the complete right of self-government in local and municipal matters. The State further provided that ordinances passed by Boulder would supersede any inconsistent statutes of the State of Colorado. This comprehensive grant of the State's governing powers to home rule cities with respect to their local affairs virtually compels the inference that the drafters of the Colorado Constitution "contemplated" the possibility that some of the acts of self-government pursued by home rule cities would be anticompetitive.[9] Although Petitioner argues that there is no evidence to indicate that the State in fact contemplated any restraint of cable television construction by its home rule cities, such a stringent standard is not required under *City of Lafayette*. The plurality there expressly "stated that a political subdivision need not point to a specific, detailed legislative authorization before it may properly assert a *Parker* defense to an antitrust suit." 435 U.S. at 415.

Moreover, this Court's decision in *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977), clearly indicates that the very broad constitutional grant of authority by Colorado to Boulder enables the City to assert a *Parker* defense to the same degree as if it were

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[9] This can be seen by the number of traditional local governmental functions that cities ordinarily could be expected to assume under such a grant of authority which have anticompetitive consequences. *See* notes 19-21 *infra* and accompanying text.

The fact that the state Attorneys General of Colorado and numerous other states implicitly urge that this was not the case should not be given much credence in light of the historical dispute between cities and states over home rule and Colorado's failure to provide that its own antitrust laws would be applicable to such conduct.

the State. In *Bates*, the Court considered whether the Arizona State Bar's enforcement of a ban against lawyer advertising violated the antitrust laws. The Court upheld the validity of the ban, observing that the challenged restraint was the "affirmative command of the Arizona Supreme Court" which was, according to the state constitution, "the ultimate body wielding the State's power over the practice of law." 433 U.S. at 360. Accordingly, the Court concluded that the restraint was "compelled by the direction of the State acting as sovereign" (*id.*), even though the particular constitutional provision neither addressed nor alluded to specific court power to impose anticompetitive restraints or prohibitions on legal advertising. The Court also observed that the state's anticompetitive policy was "clearly and affirmatively expressed" in the Arizona Supreme Court's disciplinary rules and that it was actively supervised and subject to "re-examination by the policy-maker — the Arizona Supreme Court — in enforcement proceedings," thus reducing the possibility that "federal policy was being unnecessarily and inappropriately subordinated to state policy."[10]

The striking parallels between the Court's analysis in *Bates* and the Tenth Circuit's decision below confirm the validity of the latter court's analysis. Colorado's Constitution has rendered the City of Boulder "the ultimate body wielding the State's power"

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[10] 433 U.S. at 362. The Court contrasted these facts with the circumstances in *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975) and *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579 (1976). Indeed, even *Goldfarb* and *Cantor* implicitly demonstrate that the state policy essential to the state action shield may be found not only in state legislation and constitutional provisions, but in rules and regulations reflecting policy adopted by a governmental entity exercising a constitutional or legislative grant of authority to regulate in a particular area. Thus, the failing with *Goldfarb* was not that the Virginia Supreme Court did not have the state's authority to impose an anticompetitive restraint, but rather that it did not exercise it. Similarly, in *Cantor*, the State Public Service Commission's approval of a tariff incorporating the challenged light bulb exchange program was not deemed to be a clear and affirmative expression of anticompetitive policy since, if such a program were invalidated, it would not have impaired the state's regulatory interests in the least. 428 U.S. at 579.

over all of Boulder's local and municipal affairs. Accordingly, as was so in *Bates*, the restraint imposed by Boulder should be deemed to be "compelled by direction of the state acting as sovereign," notwithstanding the absence of a particular constitutional provision alluding to the power of Boulder to make anticompetitive policies or to impose moratoriums on cable television franchises operating within its borders. Similarly, as was true of the Arizona Supreme Court, the ordinances and conduct of Boulder reflect a clear expression of the anticompetitive policy at issue, and as the policy-maker, Boulder actively supervised and reexamined that policy by virtue of the imposition of a 90-day moratorium and the issuance of civil and criminal citations to cable workers when the moratorium was ignored.[11] In short, Petitioner's blanket assertions that "only the state [and not a city or other political subdivision] can originate anticompetitive policy"[12] and that active supervision must come from the state not from the entity delegated with the state's policy-making authority[13] are contravened by *Bates*.

2. This is a different case than *City of Lafayette*, and the concerns articulated in that decision are not at issue here.

The argument that the Tenth Circuit's decision contravenes this Court's decision in *City of Lafayette* not only misreads *City of Lafayette* but ignores critical distinctions between that case and this one.

Petitioner implicitly reads the *City of Lafayette* decision as establishing that the cities' conduct at issue there was unprotected by the state action doctrine. In fact, the Court remanded the case to the District Court for an examination of the intent and effect of

[11] *See* 630 F. at 708; *see also Glenwillow Landfill* v. *City of Akron*, 485 F. Supp. 671 (N.D. Ohio 1979). In *Glenwillow*, the court rejected, on the authority of *Bates*, a challenge to a waste disposal program implemented by an Ohio home rule city. The court gave deference to the Ohio constitutional grant to cities of the power to declare the waste disposal policy that would operate within their borders.

[12] Brief for Petitioners, p. 42.

[13] *See* Petition for Writ of Certiorari, p. 9.

the Louisiana's grant of authority to the cities in order to decide whether their conduct was protected. Even assuming that the actions challenged in *City of Lafayette* would have been found to have been subject to antitrust scrutiny, however, the facts of the instant case are significantly different and clearly justify a different result.

In the first place, the grant of authority by the Louisiana legislature to the cities of Lafayette and Placquemine to own and operate electric utility systems within and beyond city limits is far more circumscribed than the constitutional grant of self-government over all local and municipal matters made by Colorado to Boulder. Second, Boulder's grant of authority provides that its city ordinances will override contrary state statutes (including the state antitrust laws). In contrast, the state statutes examined in *City of Lafayette* specifically provide that municipalities shall be subject to the antitrust laws of the United States and in no way indicate that state antitrust laws will be superseded. Third, unlike Placquemine and Lafayette, Boulder was not an owner or provider of the cable television services which it sought to regulate. Finally, whatever the alleged anticompetitive effects of Boulder's regulation may have been, they were focused on conduct within the City of Boulder itself. Accordingly, the concerns of the *City of Lafayette* Court that cities should not be given license to make economic choices counseled solely by their own "parochial interests" and without regard to their anticompetitive effects on non-constituents are not in issue here. *See* 435 U.S. at 404, 408 and 412-13.

Petitioner argues that the state action doctrine has been greatly narrowed since *Parker* and that cities now bear an extremely heavy burden of proving their entitlement to state action immunity after the *City of Lafayette* decision. If the *Parker* doctrine has been narrowed, however, it has not been retrenched in a way that would leave Boulder's governmental actions outside its perimeter. All that is clear since *City of Lafayette* is that cities acting as competitors in a market setting are not automatically protected as state actors. Each of the plurality's references to Congress' design to apply the Sherman Act to "every person engaged in *business* whose activities might restrain or monopolize *com-*

mercial intercourse among the states"[14] must be understood in the context of that case. The municipalities there were arguably engaged in business or commerce in running city utility companies in rivalry with privately-owned companies. There is no justifiable basis for expanding this language that is closely keyed to "commerce," "business" and "business affairs" to cover all the activities engaged in by a municipality in the course of the exercise of its governmental functions.[15]

Indeed, the Court's statements that its *City of Lafayette* decision does not "impair the ability of a state to delegate government power broadly to its municipalities" (435 U.S. at 416) or "threaten the legitimate exercise of government power" (*id.*) would be seriously undercut if Petitioners' contentions were accepted. As is described in the next section, any requirement that the state expressly approve and then supervise all regulations and ordinances of cities that have possible anticompetitive consequences would be the antithesis of home rule authority and would force state involvement with the daily operation of such traditionally local matters as zoning, licensing and franchising. This would of course be unworkable. Thus, it is the position of the National League of Cities that the analysis of the Tenth Circuit's decision below is eminently sensible and consistent with *City of Lafayette* and that it should therefore be affirmed.

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[14] 435 U.S. at 398-99. (Emphasis added) The Court observed that Congress, exercising "the full extent of its constitutional power, sought to establish a regime of competition as the fundamental principle governing *commerce* in this Country." (Emphasis added) *Id.* It later stated that "Congress mandated competition as the polestar by which all must be guided in ordering their *business affairs.*" 435 U.S. at 406. (Emphasis added)

[15] Finally, the *City of Lafayette* plurality determined to consider the cities' state action arguments "in light of the presumption against implied exclusion from coverage of the antirust laws" may have been appropriate in the context of the commercial activities involved in that case. But, the Court established in *Parker* v. *Brown* that Congress never intended the Sherman Act to apply to governmental actions. This fact substantially weakens any argument in this case that "repeal" of the antitrust laws must be undertaken with caution. *See generally,* Handler, "The Current Attack on the *Parker* v. *Brown* State Action Doctrine," 76 Colum. L. Rev. 1, 9 (1976).

II. PETITIONER'S INTERPRETATION OF *CITY OF LAFAYETTE* WOULD CRITICALLY IMPAIR THE ABILITY OF MUNICIPALITIES TO GOVERN AND SHOULD BE REJECTED.

In attacking the decision of the Tenth Circuit Court of Appeals below, Petitioner and the state *amici* contend that *City of Lafayette* precludes antitrust immunity for the regulatory action undertaken by the City of Boulder for the reason that implied exemptions from the antitrust laws must be narrowly construed. They argue that federal deference to states as sovereign powers does not require extension of state action immunity to the political subdivisions or agents of states. As a result, they urge that the legitimate governmental decisions and regulatory activities of municipalities and other local governments should be subject to the antitrust laws unless the state itself makes a specific decision to displace competition in a given market on the basis of a clearly articulated state policy, and the state itself further supervises any municipal conduct taken pursuant to such a state policy. Because these standards are completely inconsistent with the principle of home rule authority and because their adoption would frustrate the reasonable allocation and exercise of state and local government powers, they should be rejected.

A. The Interpretations Of *City Of Lafayette* Proposed By Petitioner And The State *Amici* Are Inconsistent With The Concept Of Home Rule And Represent An Improper Effort By Those Parties To Repeal The Constitutional Grant Of Self-Government To Municipalities.

In its constitutional home rule provisions, Colorado granted its municipalities "the full right of self-government" with respect to all local and municipal matters. By now contending that this complete grant of self-government does not confer municipalities like Boulder with the same right as the State to govern without having each and every governmental act subject to antitrust challenge, Colorado and the other state *amici* are attempting improperly to repeal the constitutional right of municipal self-government.

Petitioner's and the state *amici's* interpretation of *City of Lafayette* offers a Hobson's choice to home rule municipalities. Under their view of this decision, all municipal conduct will be subject to antitrust scrutiny unless the state specifically formulates and then supervises any course of conduct that may have anticompetitive effects. Yet, state involvement in municipal affairs is the antithesis of home rule government. Because Colorado's constitutional provisions grant home rule municipalities "the full right of self government" with respect to local matters, the state has divested all of its authority in these affairs. Thus, home rule municipalities could never meet the state action standards proposed by Petitioner unless they relinquished their right to autonomy. On the other hand, having each municipal law and regulation subject to antitrust scrutiny would severely hamper the ability of cities to govern.

The essence of government regulation is to impose conditions on public and private conduct. Accordingly, all governmental regulation can be said to restrain trade to some degree. While some restraints may be able to withstand traditional antitrust scrutiny, other governmental acts serving important public interests will not be able to meet this test.[16] It does not follow that such governmental action should be automatically invalidated. Moreover, the fact that, under the view of Petitioner and state *amici*, each municipal regulation will have to be reviewed under a protracted rule of reason analysis and be subject to a possible treble damage award, itself will serve to cripple the operation of home rule municipalities.[17] For these reasons, this view must be rejected. If the states whose attorneys general have appeared as

[16] *See* notes 19-21 *infra* and accompanying text.

[17] As the Court observed in the context of a decision which could have greatly expanded the scope of securities litigation under Rule 10(b)(5), "even a complaint which by objective standards may have very little chance of success at trial has a . . . value to the plaintiff out of any proportion to its prospect of success at trial so long as he may prevent the suit from being resolved against him by dismissal or summary judgment. The very pendency of the lawsuit may frustrate and delay normal . . . activity of the defendant which is totally unrelated to the lawsuit. *Bluechip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 740 (1975). *See also Gen. Commun. Eng.* v. *Motorola Commun. & Electronics*, 421 F. Supp. 274, 290, n.37

amici curiae truly desire to repeal or otherwise cut-back the scope of the home rule authority that they granted to their municipalities, they may do so directly through appropriate legislative enactments or amendments of their state constitutions.[18]

B. The Interpretations Of *City Of Lafayette* Proposed By Petitioner And State *Amici* Unreasonably Impinge Upon The Sovereignty Of States And Their Cities And Threaten The Effective Operation Of State And Local Governments.

States are afforded wide latitude in creating political subdivisions for the allocation of governmental power. *Holt Civic Club*

(N.D. Cal. 1976). "[T]he very ability to impose on competitors the heavy burden of antitrust litigation over claims that cannot be dismissed at the outset is dangerously anticompetitive in itself."

[18] That the state attorneys general would advocate such an unreasonable position is surprising and can only be understood in the context of the historical and periodic disagreement between states and cities over the appropriate balance of their respective powers.

Before the Revolution, cities were supreme in their exercise of local power including extensive authority over trade, citizenship and the right to engage in or regulate private businesses. "Historically, Americans have strongly believed . . . in the idea of local self-government," L. Gulick, *The Metropolitan Problem and American Ideas* 45 (1962). After the Revolution, states asserted nearly complete sovereignty over cities, J. Mileur, "Municipal Home Rule in the United States," in *Home Rule* 9 (E. Gere & M. Curran ed. 1970).

The balance of power has shifted back toward cities over time. In the nineteenth century, when cities swelled with immigrants, local affairs were still controlled by rural-dominated legislatures which all too often engaged in "raw political manipulation of local affairs," L. Gulick, *supra* at 46. These state abuses led to home rule agitation by cities which gained momentum in the direct democracy Populist movement for good government of the early twentieth century. This coalition of urban and Populist interests managed to mobilize popular opinion to wrest power from the states in order to protect cities, J. Mileur, *supra* at 12. Home rule, guaranteeing local self-government on matters of local concern, was the result.

v. *City of Tuscaloosa,* 439 U.S. 60, 71 (1978); *Sailors* v. *Board of Education,* 387 U.S. 105, 108 (1967). This flexibility is essential because the genius of local government is experimentation. As the Supreme Court said in *Reeves, Inc.* v. *Stake,* 447 U.S. 429 (1980), any other result

> would interfere significantly with a State's ability to structure relations exclusively with its own citizens. It would also threaten the future fashioning of effective and creative programs for solving local problems and distributing government largesse. A healthy regard for federalism and good government renders us reluctant to risk these results.

The Petitioners argue that *City of Lafayette* requires 1) a specific state delegation of authority for each municipal activity with anticompetitive consequences and 2) active supervision by the State itself of the particular municipal conduct in order for immunity to attach. Such an interpretation would substantially impair the ability of local governments and states to conduct important governmental affairs. Local governments engage in a wide variety of activities including zoning, land-use planning, occupational licensing and regulation, franchising, operation of municipal facilities, provision of health services, provision of utility services, transportation, housing, refuse collection and urban development. All of these activities can have competitive consequences.

If Petitioner's view were adopted and municipal government regulation were exposed across the boards to antitrust attack, the results would be staggering to municipalities and injurious to the public.[19] There are a number of useful examples. A city might

[19] City governments perform a variety of public services which account for one out of every five dollars spent by all state and local governments. This amount equals nearly one-fifth of total federal expenditures exclusive of national defense and international affairs. Of the $65.6 billion spent by city governments in the fiscal year 1978-79, $7.5 billion went to police protection and $4.1 billion to fire protection. Other city expenditures included $4.6 billion for sewage systems, $2.4 billion for sanitation, $3.2 billion for parks, $5.3 billion for water supplies and $9.9 billion on other utilities like gas and electric power. In addition, cities spent $5.3 billion on roads, $2.9 billion on hospitals, $0.8 billion for libraries and $8.4

determine that traffic and other considerations dictate that one taxi company or a limited number of taxis make runs from the city's airport and decide in conjunction to fix maximum taxi fares to prevent price gouging. Although such conduct serves legitimate governmental interests, under conventional antitrust analysis, it would constitute a *per se* violation of the antitrust laws.[20] Similarly, occupational licensing by municipalities is designed to minimize health, safety and nuisance threats to city residents, but this regulation necessarily restrains the trade of those engaged in these activities and creates barriers to market entry.[21] Cities establish local historic preservation areas in which they strictly control the kind and number of business enterprises and the structure, capacity and hours of operation of business facilities. These areas are intended to preserve heritage and promote environmental conditions. The commercial freedom of businesses located therein is consciously sacrificed to serve these interests. A city may provide a service, like bus transportation, on a monopoly basis to assure availability and minimum performance. This practice in-

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billion for education. Bureau of the Census, U.S. Department of Commerce, GF 79 No. 4, *City Government Finances in 1978-79* at 10 (1980). *Economic Report of the President,* 315, 321 (1981).

Of the 75 "major" services performed by California cities in 1974, half were mandated by state law. County Supervisors Associations of California, *Catalog of Public Services and Functions* (1974).

[20] *See, e.g.,* Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211 (1951).

[21] In one major home rule city, Columbus, Ohio, the City Council has promulgated a large number of businesses and professional codes for regulation of astrologers, auctioneers, bondsmen, itinerant wholesale produce dealers, peddlers, solicitors, pawnbrokers, secondhand dealers generally, secondhand motor vehicle dealers, wholesale produce dealers, operators of dances, dancehalls, public amusements, shows, circuses, exhibition of objects of curiosity, public utility companies, taxicabs, community antenna television systems, garbage collection, testing and sealing measuring devices, sale of ice, fruit, vegetables, berries, petroleum products and home improvement contractors. *See Columbus City Codes, passim.*

evitably excludes private competitors from the market. A governmental unit frequently will require private purveyors of essential utilities like water or electricity to serve the entire city or to serve it in a particular manner in order to guarantee that the needs of all segments of the population will be accommodated. This requirement may well contravene the private companies' pure commercial interests.

Because each of the foregoing courses of conduct promotes some other concern at the expense of a pure free-market environment, each could be subject to antitrust attack. Under Petitioner's reading of *City of Lafayette*, the only way these kinds of traditional local governmental activities would be immunized would be for the perpetrators to be able to point first, to a specific and clear state policy to displace competition with respect to a particular municipal activity and then, to obvious active state supervision of the activity questioned.

The fallacy of this approach is that it would be impossible for cities to obtain from their state legislatures on an individual basis specific approval for each of the myriad of policy choices and administrative decisions they make in the course of self-government that have attendant effects on competition. Even if the Petitioner's requirement were interpreted less strictly to call only for approval by the categories of municipal regulatory activities, the sheer volume of necessary legislative participation in local affairs would be enormous. It is simply unrealistic to assume that state legislatures have the resources, expertise or interest to immerse themselves in the variety of activities engaged in by their subdivisions.

Petitioner's analysis of *City of Lafayette* also would seriously impair the ability of states to delegate authority to local government. The decentralization of state power has left state governments free to devote attention and resources to matters of statewide concern, broadly delegating power to local authorities with the interest and expertise to deal quickly and flexibly with local problems. Citizen participation in local problem solving has been fostered. Yet, Petitioner's interpretation of *City of Lafayette*

"corner[s] cities into a rigid and narrow nineteenth century dependence upon the state."[22]

In addition, even if the states were willing to undertake the substantial cost and burden to develop the pervasive policy guidelines necessary to satisfy the Petitioner's proposed criteria, the likely result would be a uniformity of State policy rather than vital and long appreciated local experimentation. In reviewing the exercise of state power, moreover, courts might well be obliged to second-guess each of the substantive government decisions to replace competition with regulation or monopoly service.[23] What criteria the courts would employ in making such substantive determinations is unclear but would be likely to further stifle local government, initiative and experimentation. In sum, the full and meaningful sovereignty which federalism guarantees state and local government would be subverted if the rigid constraints which Petitioners would impose on municipal government in the name of *City of Lafayette* are not rejected.

In this regard, this Court's decision in *National League of Cities* v. *Usery,* 426 U.S. 833 (1976) is of special significance. In *Usery,* this Court held that Congress lacked the power to reach and control the employment conditions of state and local governments through the Fair Labor Standards Act[24] noting that the

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[22] Freilich, Growock & Ungar, "1977-78 Annual Review of Local Government Law: Judicial and Constitutional Intervention in Municipal Fiscal Affairs," 10 Urb. L. 573, 604-05 (1978).

[23] *See Fergerson* v. *Sherupa,* 372 U.S. 726, 730 (1963) (courts should not "sit as a superlegislature to weigh the wisdom of legislation).

[24] More specifically, the Court upheld a challenge to minimum wage and hour requirements which Congress sought to impose on state and local governments through amendments to the Fair Labor Standards Act. This legislation, as it was originally enacted in 1938, applied only to private employers. Employees of the United States, the several states and political subdivisions of the states were excluded from coverage. The Act was amended in 1961 to include certain public employees working in "enterprises engaged in commerce or in the production of goods for commerce," and again in 1971 to bring employees of state hospitals, institutions and schools within its coverage. The constitutionality of these amendments was sustained in *Maryland* v. *Wirtz,* 392 U.S. 183 (1968). Finally, the Act was

Tenth Amendment prevents Congress from "exercis[ing] power in a fashion that impairs the State's integrity or their ability to function effectively in a federal system."[25]

The Court specifically considered the impact of the amendments on the performance by state and local governments in discharging their dual functions of administering public law and furnishing public services and concluded that even if the federal requirements might be socially desirable, they might "substantially restructure the ways in which the local governments have arranged their affairs." 426 U.S. at 833. For that reason, the Court concluded:

> This exercise of congressional authority does not compare with the federal system of government embodied in the Constitution. We hold that insofar as the challenged amendments operate to directly displace the State's freedom to structure integral operations of traditional governmental functions, they are not within the authority granted Congress by [the Commerce Clause]. 426 U.S. at 852.

The Court thus recognized that principles of federalism as well as Tenth Amendment limitations militate against Congress' imposing on local governments "its choices as to how essential decisions

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amended in 1974 to define the term "employer" to include a "public agency" employing persons "handling, selling or otherwise working on goods or materials that have been moved in or produced for commerce." By these amendments, Congress acting under the Commerce Clause sought to remove the exemption that had existed for state and local employees.

[25] 426 U.S. at 833 (quoting *Fry* v. *United States*, 421 U.S. 542, 547, n.7). Recognizing a Commerce Clause power in Congress to preempt state regulation of the private sector, the Court nevertheless stated:

> It is quite another [matter] to uphold a similar exercise of congressional authority directed, not to private citizens, but to the States as States. We have repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner. 426 U.S. at 845.

regarding the conduct of integral governmental functions are made." Moreover, the opinion clearly addressed the unwisdom of congressional interference not only with states but also with cities:

> The local governmental units which Congress sought to bring within the Act derive their authority and power from their respective States. Interference with integral governmental services provided by such subordinate arms of a state government is therefore beyond the reach of congressional power under the Commerce Clause just as if the services were provided by the State itself. 426 U.S. at 855, n.20.

The language and rationale of the *Usery* decision squarely countermand the interpretation of *City of Lafayette* offered by Petitioner and the state *amici*. Indeed, *Usery* means that the competitive choices embodied in the federal antitrust laws cannot be imposed upon cities or states to the extent that they interfere with the conduct of integral government affairs. Accordingly, it would be illogical and unnecessary to interpret the *City of Lafayette* decision as calling for this degree of intrusion.

III. The Tenth Circuit's Decision Strikes The Proper Balance Between Constitutional Principles Of Federalism And The Congressional Desire To Establish Competition As The Guiding Principle Governing Commerce By Neither Impairing The Abilities Of States And Cities To Allocate And Exercise Government Power Nor Providing Those Entities With A License To Violate The Antitrust Laws With Impunity.

The analysis utilized by the Tenth Circuit below and urged by NLC in this brief suggests that the state action defense of a state subdivision should be conditioned on satisfaction of two standards: (1) that the governmental entity possess the authority of the state to act as sovereign and (2) that in acting in this capacity, the governmental entity clearly articulate and affirmatively express the policy underlying its conduct, as well as actively supervise this conduct.

Here, there is no dispute that Boulder satisfied the second standard. The issue is whether Colorado's grant to Boulder of the full right of self-government with respect to local and municipal

matters (including the right to supersede contrary state statutes) is sufficient to imbue Boulder with the state's sovereign authority with respect to such affairs as the construction of a cable television network within Boulder's borders. Petitioner's contention that Boulder's home rule authority does not make it sovereign is based on its view that cities and other political subdivisions lack the power "to originate" anticompetitive policies even where the state has delegated them complete authority to make policy with respect to particular matters. Petitioner apparently believes that while a state can delegate the authority to establish policy to a government agency or political subdivision, the policy established cannot have anticompetitive effects unless the state has specifically approved it. As argued earlier, such a system would be completely unworkable. It would subject virtually all local governmental policy and regulation to antitrust scrutiny, and regulatory systems and policies long considered appropriate would be invalidated.

Petitioner argues on the other hand, that if the Tenth Circuit's decision is affirmed, thousands of home rule cities will be given blanket immunity to violate the federal antitrust laws and to engage in predatory conduct with devastating state-wide and possibly national effects whenever their parochial interests so dictate. Such a result in no way will follow from an affirmance of the Tenth Circuit's decision and analysis.

In the first place, the antitrust immunity of cities will be no broader than that of states which do not have blanket antitrust immunity.[26]

[26] As the Supreme Court recognized, the State may not authorize private parties to violate the federal antitrust laws, *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384 (1951), nor shield private conduct by reason of state involvement, *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579 (1976). Where the State conspires to restrain or monopolize trade, the antitrust laws may reach and proscribe its conduct. *Id.* 587-89. States are "persons" for purposes of the antitrust laws and may sue or be sued under them, *Georgia* v. *Evans*, 316 U.S. 159 (1942). Nothing in their status as states precludes such a result. *See Union Pacific R. R.* v. *United States*, 313 U.S. 450 (1941); *Jordan* v. *Mills*, 473 F. Supp. 13 (E.D. Mich. 1979) (class action by prison inmate regarding price fix-

Second, to be able to assert a *Parker* defense, cities will require the explicit or implicit authority from the State to act as sovereign with respect to particular matters. Here, Colorado's grant of home rule autonomy has conferred such authority.[27] The home rule provisions of other states may confer far less authority[28] and consequently provide a narrower basis for antitrust immunity. Moreover, even Colorado has the power to rescind its broad grant of authority through appropriate constitutional means.

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ing, conspiracy and monopolistic practices at state-run prison store); *Reid* v. *University of Minnesota,* 107 F. Supp. 439 (N.D Ohio 1952) (sales of books by state university press challenged under the price discrimination provisions of the Robinson-Patman Act). *Cf. Reeves, Inc.* v. *Stake,* 447 U.S. 429 (1980). In *Reeves,* the Court rejected a burden on interstate commerce challenge to the refusal of the State of South Dakota to sell cement manufactured in its state-owned and operated facility to out-of-state customers during a time of shortage. The Court said:

> state proprietary activities may be, and often are, burdened with the same restrictions imposed on private market participants. 447 U.S. at 439.

In reaching its decision, the Court found controlling traditional antitrust principles including:

> the long recognized right of trader or manufacturer, engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. 447 U.S. at 438-39. (quoting *United States* v. *Colgate & Co.,* 250 U.S. at 300, 307 (1919).

[27] Even here, however, Colorado did not intend to make its home rule cities sovereign with respect to matters which were not essentially local. Hence, if Boulder's ordinances had restrained trade outside its own territorial limits, this matter would not be local, and Boulder's conduct would not be subject to a *Parker* defense.

Indeed, only six states authorize cities to act on state-wide matters and only then in the absence of a state prohibition or preemption. *See* chart in Appendix to Petitioners' Brief. Thus, the fears of the state *amici* and Petitioners that the Tenth Circuit's decision contravenes the policies expressed in *City of Lafayette* are greatly exaggerated.

[28] For example, in the 27 states whose grants of municipal authority do not expressly provide that a city's ordinances shall

Third, cities must clearly articulate and affirmatively express the policy underlying any anticompetitive restraint that is imposed and actively supervise or re-examine such policy on a regular basis. *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980).

Finally, and most importantly, these standards need not be interpreted or applied mechanically or inflexibly without regard to the particular anticompetitive policy or conduct adopted. Inherent in the requirement that the policy underlying a particular governmentally-imposed restraint of competition be "clearly articulated and affirmatively expressed" is the principle that the restraint must bear a rational relationship to, and, in some circumstances, be no broader than necessary to achieve a legitimate governmental interest.[29] Accordingly, it would be a rare instance in which the state action doctrine would protect truly predatory behavior.

Application of the standards proposed above need not ignore the fact that a city or a state may be acting in a proprietary rather than a governmental capacity and that it may be motivated by interests which appear to be more "private" than "public." Although the proprietary/governmental distinction may not always be clear-cut, where it is,[30] the engagement in proprietary

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supersede contrary state statutes and where such states have expressed a policy through statutory or regulatory means which is inconsistent with that adopted by a municipality, it would be fair to infer that the municipality may not have been intended or contemplated to act as sovereign with respect to such matters.

[29] Thus, in *Bates, supra,* the Court explained that the state's clear and affirmative expression of the policy behind its challenged restraint along with its active supervision reduced the Court's concern that federal policy was unnecessarily and inappropriately being subordinated to state policy. It would appear that implicit in this statement is the premise that the state policy be a rational one in furtherance of a legitimate government goal, for if this were not so, the Court's concern would hardly be reduced.

[30] *See Reeves, Inc.* v. *Stake,* 447 U.S. 429 (1980). (Holding that policy imposed by South Dakota to restrict sales from its

activities should trigger close scrutiny of whether a municipality is "as sovereign, impos[ing a] restraint as an act of government. . . ."[31] On the other hand, where a political subdivision is engaging in such traditional regulatory matters as zoning, a less rigorous application of these standards might be justified.[32]

In summary, the Tenth Circuit's decision successfully accommodates the tension between important national values that was so clearly evident in *City of Lafayette* and illustrates the kind of formulation necessary to avoid promoting either fundamental interest to the absolute detriment of the other.

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state-operated cement plant to South Dakota residents did not violate Commerce Clause since state was simply acting in a proprietary capacity.) The Court also held that in this context "the basic distinction . . . between states as market participants and states as market regulators makes good sense and sound law. *Id.* at 436. *Compare City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. at 433 ("The distinction between 'proprietary' and 'governmental' activities has aptly been described as a 'quagmire' [citing *Indian Towing Co., Inc.* v. *United States,* 350 U.S. 61, 65, 67-68 (1955)] (Stewart, J., dissenting).

[31] *Parker* v. *Brown,* 317 U.S. 341, 352 (1943). Indeed, *Parker's* express reference to the imposition of the restraint by the state "as an act of government" when coupled with its distinguishing of a "state or its municipality" participating in a "private agreement or combination by others for restraint of trade" (*Id.* at 351-52) would lend further support to regarding the proprietary/governmental distinction as a factor worthy of consideration.

[32] In essence, as is so in the "equal protection cases," the level of scrutiny would vary according to the type of restraint at issue. *See, e.g., Craig* v. *Boren,* 429 U.S. 190 (1976); *Reed* v. *Reed,* 404 U.S. 71 (1971).

CONCLUSION

For the foregoing reasons, the judgment of the United States Circuit Court for the Tenth Judicial Circuit should be affirmed.

Respectfully submitted,

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